Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

ALEXANDRE KONANYKHINE,
Petitioner,

v.

IZVESTIA NEWSPAPER and EDITORIAL STAFF OF IZVESTIA NEWSPAPER,
Respondents.

On Petition for a Writ of Certiorari to the Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A 1935 agreement between the United States and the former Soviet Union established procedures to be followed in the execution of letters rogatory.* This agreement lay dormant and without judicial interpretation for almost sixty years, but was recently resurrected in a series of contradictory decisions concerning service of process on defendants located in the Russian Federation.

The questions presented are:

1. Whether the 1935 agreement is valid.

2. Whether the 1935 agreement provides the exclusive method of perfecting service of process on defendants located in the Russian Federation.

3. Whether the trial court erred in vacating a default judgment and in dismissing a civil action against a Russian defendant on the sole ground that service of process was not perfected via letters rogatory pursuant to the 1935 agreement.

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* Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262. ("1935 agreement") (reprinted at pages 15a-23a of the appendix).

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On Petition for a Writ of Certiorari to the Virginia Supreme Court

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PETITION FOR WRIT OF CERTIORARI

Alexandre Konanykhine ("Konanykhine") respectfully petitions for a writ of certiorari to the Virginia Supreme Court.

CITATIONS OF OPINIONS AND ORDERS BELOW

The Arlington County Circuit Court order vacating the default judgment is reproduced at page 2a of the appendix ("Pet App."). The Arlington County Circuit Court letter opinion quashing service of process and dismissing the case against respondents is reproduced at Pet. App. 6a. The Arlington County Circuit Court order formally quashing service of process and dismissing the case against respondents is reproduced at Pet. App. 4a. The Virginia Supreme Court order refusing to consider Konanykhine's petition for appeal

is reproduced at Pet. App. 1a. The Virginia Supreme Court order denying Konanykhine's petition for rehearing is reproduced at Pet. App. 14a. No opinion or order was reported.

BASIS FOR JURISDICTION

The Arlington County Circuit Court vacated the default judgment on March 10, 2000. Pet. App. 2a. The Arlington County Circuit Court quashed service of process and dismissed the case on October 13, 2000. Pet. App. 4a. The Virginia Supreme Court denied Konanykhine's petition for appeal on March 5, 2001. Pet. App. 1a. The Virginia Supreme Court denied Konanykhine's petition for rehearing on April 20, 2001. Pet. App. 14a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (2001) and SUP. CT. R. 10(c) since this case involves an important question of federal law that has not been, but should be, settled by this Court. Specifically, the state court applied its interpretation of a treaty between the United States and the former Soviet Union in vacating a default judgment and in dismissing a case against a defendant located in the Russian Federation.

Since 28 U.S.C. § 2403(a) (2001) may apply, notifications required by SUP. CT. R. 29.4(b) have been made.

INTERNATIONAL AGREEMENT INVOLVED IN THIS CASE

Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262.

Because of its length, the full text of this agreement is set forth at Pet. App. 15a-23a.

STATEMENT OF THE CASE

A. Introduction

This case presents the narrow issue of whether a party suing a Russian defendant in a United States court must resort to the exclusive use of the complicated, dilatory and expensive system of letters rogatory in order to perfect service on the Russian defendant. In the instant matter, a Russian defendant who transacted business in Virginia, was served with process pursuant to the Virginia long-arm statute. This statute prescribed delivery of the initial pleadings and Russian translations thereof to the Secretary of the Commonwealth of Virginia, who, under Virginia law, was the Russian defendant's involuntary agent for service of process. The Russian defendant filed a response to Konanykhine's initial pleading but did not raise defective service as a defense. Aside from filing its response, the Russian defendant failed to further participate in the litigation until after a default judgment was entered. The sole issue to be decided is whether service on the Russian defendant's involuntary agent for service of process which actually reached the Russian defendant is valid, despite the 1935 agreement. Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262. ("1935 agreement") Pet. App. 15a-23a.

B. Background of Parties, Service of Process and Default Judgment

Alexandre Konanykhine was born in the former Soviet Union in 1966. By 1992, Konanykhine's estimated worth was over three hundred million dollars, making him one of the wealthiest men in Russia. In addition to his business pursuits, Konanykhine was politically active and supported Russian President Boris Yeltsin's anti-corruption, pro-capitalist and pro-democratic policies by providing half of

President Yeltsin's campaign funds. In mid-1992, several current or former KGB members kidnapped Konanykhine and seized control of his businesses under threat of death. After escaping from his kidnappers, Konanykhine fled to the United States, where he sought political asylum. In awarding Konanykhine political asylum, the United States Immigration Court found that the Russian government engineered false claims against Konanykhine in order to punish him for exposing corruption among Russian government and business officials.

Izvestia Newspaper and Editorial Staff of Izvestia Newspaper (collectively "Izvestia") publish the newspaper, *Izvestia*, in Moscow, Russia. In 1996 and 1997, Izvestia published several defamatory articles concerning Konanykhine. Because Izvestia transacted business in Virginia by employing an editor in Virginia, by locating its U.S. bureau in Virginia, and by delivering the defamatory articles into Virginia, Konanykhine filed a civil action in the Arlington County Circuit Court pursuant to the Virginia Long-Arm Statute, VA. CODE ANN. §8.01-328.1 (Michie 1997). In December 1997, Konanykhine served both English and Russian language copies of his initial pleadings on the Secretary of the Commonwealth of Virginia, who, under Virginia law, was Izvestia's involuntary agent for service of process. Izvestia received the documents served on the Virginia Secretary of the Commonwealth and filed a legally defective response to Konanykhine's initial pleading. Pet. App. 24a-26a. Izvestia's response did not raise defective service as a defense. In April 1998, the trial court found that valid service of process was made upon Izvestia and that Izvestia was in default for its failure to properly respond to Konanykhine's claims. Pet. App. 10a-13a. Aside from filing its initial response, Izvestia failed to further participate in the defamation litigation or jury trial on Konanykhine's damages. In December 1999, the jury returned a $33,500,000 verdict in

Konanykhine's favor and the trial court entered judgment by default in the amount of the jury verdict. Pet. App. 8a.

C. Orders Dismissing Case based on Non-compliance with 1935 Agreement

1. *Trial Court Orders*

In February 2000, Izvestia filed its motion to vacate the default judgment, claiming that the 1935 agreement required service of process via letters rogatory. In March 2000, after extensive briefing and oral argument, the trial court vacated the default judgment on the sole ground that "service was not perfected pursuant to the 1935 agreement." Pet. App. 2a. Konanykhine objected to the entry of this order interpreting the 1935 agreement pursuant to Virginia law by endorsing the order "SEEN AND OBJECTED." Izvestia then moved to dismiss Konanykhine's case since service of process was not perfected via letters rogatory. On August 25, 2000, after entensive briefing and oral argument, the trial court dismissed the case via a letter opinion, holding that "the only proper means of service on Defendant Izvestia Newspaper is through letters rogatory. No such service was made. Thus, service was not proper in this case." Pet. App. 6a. On October 13, 2000, the trial court incorporated its letter opinion into a formal order dismissing the case. Pet. App. 4a. Konanykhine objected to the entry of this order interpreting the 1935 agreement pursuant to Virginia law by endorsing the order "SEEN AND OBJECTED TO ON ALL GROUNDS ASSERTED ON BRIEF AND AT ORAL ARGUMENT."

2. *Virginia Supreme Court Refusal to Review Trial Court Orders*

On November 21, 2000, Konanykhine petitioned the Virginia Supreme Court for review of the trial court's orders vacating the default judgment and dismissing the case, claiming that the 1935 agreement did not require service to be

perfected via letters rogatory. On March 5, 2001, the Virginia Supreme Court refused to exercise its discretion to review the trial court's orders in an unpublished two sentence order. Pet. App. 1a. On March 19, 2001, Konanykhine filed his timely petition for rehearing of the Virginia Supreme Court's refusal to review the trial court's orders. On April 20, 2001, the Virginia Supreme Court denied Konanykhine's petition for rehearing. Pet. App. 14a.

REASONS FOR GRANTING THE WRIT

I. RECENT CONFLICTING U.S. DISTRICT COURT DECISIONS INTERPRETING THE LONG DORMANT 1935 AGREEMENT BETWEEN THE UNITED STATES AND SOVIET UNION REVEAL A NEED FOR CLARIFICATION REGARDING THE APPLICABILITY OF THIS AGREEMENT TO SERVICE OF PROCESS ON RUSSIAN DEFENDANTS

In 1935, the United States and Soviet Union entered into an agreement regarding the procedures for execution of letters rogatory. Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262. Pet. App. 15a-23a. The 1935 agreement did not establish the exclusive or mandatory method of perfecting service of process on a defendant located in the Soviet Union, as the lower court in the instant matter held, but rather sets forth such ministerial procedures as the fees to be paid in the execution of letters rogatory, the name of the court to which the letters rogatory were to be addressed and nature of the documents which must accompany the letters rogatory. In addition, there were very few, if any, private parties in the Soviet Union engaged in international transactions when the agreement was made. Therefore, in all likelihood, the 1935 agreement's drafters did

not contemplate that this agreement would require perfection of service via letters rogatory on a defendant which had conducted business in the U.S. but is domiciled in the Soviet Union, or as in the instant case, the successor state, the Russian Federation.

A. Completely Conflicting Decisions of U.S. District Courts Interpreting the 1935 Agreement

For almost sixty years, the 1935 agreement lay dormant and without court interpretation. In 1993, a court, for the first time, interpreted the 1935 agreement. In *Filus v. LOT Polish Airlines*, 907 F.2d 1328 (2nd Cir. 1990), which involved the U.S.S.R.'s claim of sovereign immunity, the Soviet Union objected to service of process based, in part, on non-compliance with the 1935 agreement. In *Filus*, the Second Circuit remanded the case to the district court, stating "[t]he legality of the service of process obtained by plaintiff must be evaluated in the light of the diplomatic exchange of notes [the 1935 agreement]." *Filus*, 907 F.2d at 1333. On remand, the district court found that the 1935 agreement does not require service via letters rogatory, stating "[p]lainly this exchange does not constitute an 'applicable international convention' for service of judicial documents. It covers procedures for each country to honor letters rogatory issued by courts of the other country." *Filus v. LOT Polish Airlines*, 819 F. Supp. 232, 237 (S.D.N.Y. 1993). Then, in *Semtek International Inc. v. Merkuriy Ltd.*, C.A. No. 95-11920-RCL, 1996 U.S. Dist. LEXIS 22248 (D. Ma. 1996), reprinted at Pet. App. 33a, the court came to a different interpretation of the 1935 agreement. In *Semtek*, the court observed that "[p]ursuant to [the agreement], the service of United States judicial documents upon a defendant in Russia is proper if it is accomplished by means of a letter rogatory." *Semtek* also observed that "[w]hile there is nothing in [the 1935 agreement] which explicitly precludes other methods of service other than letters

rogatory, a Supreme Soviet decrees strongly indicates that this is the case." In 1998, the United States District Court for the District of Massachusetts again held that the 1935 agreement "requires service by letters rogatory." *J.L. Reardon Associates, Ltd. v. NPO Energomash*, C.A. No. 97-10409-GAO, (D. Ma. 1998), reprinted at Pet. App. 40a. In 2000, the trial court in the instant matter, in reliance upon *Semtek* and *Reardon*, vacated the default judgment and dismissed the case against Izvestia even though Izvestia had actual knowledge of Konanykhine's case, and filed a response in the case, solely because Konanykhine did not perfect service via letters rogatory pursuant to the 1935 agreement. Pet. App. 2a-7a. The Virginia Supreme Court exercised its discretion to refuse to consider Konanykhine's appeal of the trial court's orders vacating the default judgment and dismissing the case. Pet. App. 1a. Also in 2000, a case in the Southern District of New York involved the interpretation of the 1935 agreement, but the defendant in that case, the Russian Federation, withdrew objections to service of process prior to court ruling on the Russian Federation's objections. *See Compagnie NOGA D'Importation Et D'Exportation S.A. v. Russian Federation*, No. 00-CIV-0632 (WHP) and No. 00-CIV-6995 (WHP), (combined cases), (S.D.N.Y 2000). Finally, in 2001, a court held that the 1935 agreement "merely sets forth procedures for executing letters rogatory" and "does not prohibit other means of service." *Forum Financial Group, L.L.C. v. President and Fellows of Harvard College*, 199 F.R.D. 22 (D. Me. 2001), reprinted at Pet. App. 27a. In fact, *Forum Financial* observed that the "continuing validity and applicability of the 1935 Agreement with the U.S.S.R. (not Russia) is unclear" and compared *Semtek*, which held that service on Russian defendants must be made via letters rogatory, with the U.S. State Department publication *Judicial Assistance in the Russian Federation, available at* http://travel.state.gov/ russia_legal.html which stated that

"[a]t present, no bilateral agreement on judicial assistance exists between the United States and Russia."

B. Importance of a Definitive Interpretation of the 1935 Agreement

The issue presented by this case is important. In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 531 (1987), this Court noted that there has been a "substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades." Since this Court's decision in *Societe Nationale* in 1987, the Iron Curtain has fallen, providing much opportunity for investment in, and trade with, former Eastern-bloc nations, such as the Russian Federation. In fact, total bilateral trade between the United States and Russia expanded 32% in 2000 to more than $10 Billion. U.S. Dept. of Commerce, Business Information Service for the Newly Independent States, *U.S.—Russia Trade Highlights (2000)*, § II, *available at* http://www.bisnis.doc.gov/bisnis/country/USRStrade_2000.htm. U.S. imports from Russia in 2000 reached an all-time high of nearly $7.8 billion, increasing more than 34% over 1999. *Id.* at § IV. Furthermore, Russia provides more products to the United States than all other Central and Eastern European countries combined. *Id.* at § VI. With such trade inevitably comes litigation. The particular issues presented by this case are likely to recur with some frequency. Indeed, it is to be expected that plaintiffs in U.S. courts will attempt to perfect service on defendants located in the Russian Federation in ways other than by letters rogatory, which this Court described as "complicated, dilatory and expensive" and "the exception, rather than the rule" for obtaining evidence located in other countries. *Societe Nationale*, 482 U.S. at 531.

This case provides an ideal vehicle for the Court to resolve the significant dispute between recent conflicting decisions

interpreting the 1935 agreement before additional disputes involving Russian defendants reach litigation. More specifically, this case presents the Court with the opportunity to provide guidance to plaintiffs in American courts seeking to perfect service on defendants located in the Russian Federation and other countries formerly associated with the Soviet Union.

II. THE LOWER COURT ERRED IN HOLDING THAT SERVICE OF PROCESS ON A RUSSIAN DEFENDANT IS INVALID UNLESS PERFECTED VIA LETTERS ROGATORY PURSUANT TO THE 1935 AGREEMENT

A. The Plain Language of the 1935 Agreement does not Set Forth the Exclusive or Mandatory Method of Perfecting Service on a Russian Defendant

The plain language of the 1935 agreement evidences no intent on the part of its drafters to make letters rogatory the exclusive method of perfecting service on a defendant located in the Russian Federation; nor does the history of the 1935 agreement evidence any such intent. Nothing in the 1935 agreement even refers to service of process on a defendant, but rather, the agreement sets forth such ministerial procedures as the fees to be paid in the execution of letters rogatory, the name of the court to which the letters rogatory were to be addressed and nature of the documents which must accompany the letters rogatory. Pet. App. 15a-23a. In fact, a leading American law dictionary, available to the 1935 agreement's drafters, defined "letters rogatory" as:

> [a] formal communication in writing, sent by a court in which an action is pending to a court or judge of a foreign country, requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action.

BLACK'S LAW DICTIONARY 1092 (3rd ed. 1933). This 1933 edition of Black's Law Dictionary did not define the term "letters rogatory" in any way as encompassing the service of process on a defendant.

1. *Societe Nationale's Literal Interpretation Rule*

Courts have the authority to construe treaties and executive agreements. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986). *Societe Nationale* held that "[t]he great object of an international agreement is to define the common ground between sovereign nations. Given the gulfs of language, culture, and values that separate nations, it is essential in international agreements for the parties to make explicit their common ground on the most rudimentary of matters." *Societe Nationale*, 482, U.S. 522, 537, n.23 (1987). *See also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J. dissenting). In construing a treaty, as in construing a statute, the court must first look to its terms to determine its meaning. *United States v. Alvarez-Machain*, 504 U.S. 655, 663 (1992). Since the 1935 agreement makes no mention of service of process, the trial court was in error in holding that service of process on a Russian defendant is valid only if perfected via letters rogatory.

In *Societe Nationale*, the court interpreted the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 ("Hague Convention"). The Hague Convention (like the 1935 agreement) prescribes certain procedures by which a judicial authority in one contracting state may request evidence located in another contracting state. The question presented in *Societe Nationale* concerned the extent to which a federal district court is required to employ the procedures set forth in the Hague Convention when litigants seek responses to written discovery from an

adversary located within a treaty signatory's territory. *Societe Nationale* rejected the interpretation of the Hague Convention as requiring the use of the procedures set forth in the Convention to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court. *Societe Nationale*, 482 U.S. at 533-34. *Societe Nationale* held that the Hague Convention does not provide the exclusive or mandatory procedures for obtaining documents and information located within the territory of a foreign signatory. *Id.* at 529. *Societe Nationale* also rejected the interpretation of the Hague Convention as requiring that the procedures set forth in the Convention be used before resorting to other methods of gathering evidence. *Id.* at 533-34. Like the 1935 Agreement at issue in the instant case, the Hague Convention had a simple and unambiguous purpose - "to facilitate the transmission and execution of Letters of Request [and] to improve mutual judicial cooperation in civil or commercial matters." *Id.*, *quoting* Hague Convention, 23 U.S.T. at 2557. As should also be the interpretation of the 1935 agreement at issue in the instant matter, *Societe Nationale* held that the Hague Convention's preamble "does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices." *Id.* In addition, *Societe Nationale* held that the text of the Hague Convention itself "does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures." *Id.* *Societe Nationale* further found that the words used in the Hague Convention "delineate the extent of their agreement, without prejudice to their existing rights and practices, they bound themselves to comply with any request for judicial assistance that did comply with the treaty's procedures." *Id.* at 537, n.23. The 1935 agreement's preambles (like the

Hague Convention's preamble, as interpreted by *Societe Nationale*) simply state:

> Confirming conversations between the American Embassy in Moscow and the People's Commissariat for Foreign Affairs with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of courts in the other, I have the honor to inform you of the conditions under which and the manner in which courts in the United States may execute letters rogatory issuing out of courts in the Union of Soviet Socialist Republics.

Note from American Ambassador to the People's Commissar for Foreign Affairs, pmbl. Pet. App. 15a. (emphasis added), and:

> Confirming conversations between the People's Commissariat for Foreign Affairs and the American embassy in Moscow with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of the courts in the other, I have the honor to inform you of the procedure according to which the courts of the Union of Soviet Socialist Republics will accept for execution letters rogatory of courts in the United States of America.

Note from the People's Commissar for Foreign Affairs to the American Ambassador, pmbl. Pet. App. 19a-20a. (emphasis added).

The 1935 agreement did not modify the laws of the United States or Soviet Union which were in effect at the time the agreement was made. The 1935 agreement did not require either party to change any of its laws upon the entering of the agreement. The agreement was therefore, as the formal title of the 1935 agreement suggests, only related to the procedures to be followed in the execution of letters rogatory.

Societe Nationale found that the "utter absence in the Hague Convention of an exclusivity provision has an obvious explanation: the contracting states did not agree that its procedures were to be exclusive." 482 U.S. 537, n.23. *Societe Nationale* further found that "the treaty language that the parties have agreed upon and ratified [is] a surer indication of their intentions than the separate opinion's hypothesis about the expectations of the parties." *Id.* The 1935 agreement, like the Hague Convention, set forth procedures to be used in the performance of ministerial judicial tasks such as obtaining evidence and taking witness testimony. The language used by the drafters of the 1935 agreement is clear. Had the drafters intended that the 1935 agreement apply to service of process on defendants located in the former Soviet Union, they would have placed such language in the text of the agreement itself. Since no such language is present in the 1935 agreement, the *Societe Nationale* literal interpretation rule applies — that the 1935 agreement does not require that service of process be perfected on a Russian defendant via letters rogatory.

2. *The Foreign Sovereign Immunities Act does not Require a U.S. Plaintiff to Serve the Russian Government via Letters Rogatory*

Even the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.* (2001), which confers immunity on foreign governments, does not require service to be perfected on the Russian Government via letters rogatory. It is illogical to interpret the 1935 agreement as requiring service on a non-governmental entity located in Russia to be perfected via letters rogatory, but permit service on the Russian government to be perfected by simply having a U.S. trial court clerk mail a copy of the summons, complaint and notice of suit, together with a Russian translation of each document, to the head of the Russian Federation's Ministry of Foreign Affairs. *See* 28

U.S.C. § 1608(a)(3) (2001). In fact, a literal reading of the 1935 agreement makes no distinction between a private party in Russia, such as Izvestia, and the Russian Government itself; an important fact, considering that neither the Russian Federation, nor the Soviet Union, are believed to have ever sought the protection of the 1935 agreement when sued as a defendant in the United States besides the withdrawn objections to service of process in the New York case. *See Compagnie NOGA D'Importation Et D'Exportation S.A. v. Russian Federation*, No. 00-CIV-0632 (WHP) and No. 00-CIV-6995 (WHP), (combined cases), (S.D.N.Y. 2000). It is, perhaps, unfortunate that the Russian Federation withdrew its objections to service of process in the New York case before the court could rule upon whether the 1935 agreement's provision allowing the Soviet government to unilaterally refuse to permit service on a defendant shields the Russian government from suit when that government is sued in U.S. courts pursuant to the Foreign Sovereign Immunities Act, but it is likely that this issue will reoccur.

B. Izvestia did not Contest Service in its Original Response to Konanykhine's Suit

In its original response to Konanykhine's lawsuit, Izvestia did not argue that service on its involuntary agent for service of process was defective or improper pursuant to Virginia law. Izvestia received actual notice of Konanykhine's suit, filed a response to that suit, and failed to further participate in the litigation until a $33,500,000 default judgment was entered after a jury trial on damages. Because Izvestia received actual notice of Konanykhine's suit, Konanykhine's service on the Virginia Secretary of the Commonwealth, Izvestia's involuntary agent for service of process, met the Due Process Clause requirement that every method of service provide "notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their

objections." *Volkswagenwerk Aktiengesellschaft, v. Schlunk*, 486 U.S. 694, 706 (1988), *quoting Mullane v. Central Hanover Bank and Trust Co.*, 339, U.S. 306, 314 (1950).

III. AN INTERPRETATION OF THE 1935 AGREEMENT WHICH REQUIRES SERVICE TO BE PERFECTED ON A RUSSIAN DEFENDANT VIA LETTERS ROGATORY RENDERS U.S. JUDICIAL SOVEREIGNTY SUBSERVIENT TO THE JUDICIAL SOVEREIGNTY OF THE RUSSIAN FEDERATION

An interpretation of the 1935 agreement which requires the use of letters rogatory in order to perfect service on a Russian defendant transacting business in the United States will allow the Russian government to use its own unreviewable discretion to decide whether an action against the Russian defendant can proceed in United States courts. The 1935 Agreement provides that "[t]he execution of letters rogatory issuing out of a court in the United States may be refused in whole or in part, if the appropriate authorities in the Union of Soviet Socialist Republics consider that the execution thereof would affect its sovereignty or safety." Note from the People's Commissar for Foreign Affairs to the American Ambassador, art. 8. Pet. App. 20a-22a. Requiring U.S. litigants, in all cases, to attempt to serve defendants located in the Russian Federation via letters rogatory pursuant to the 1935 agreement renders United States judicial sovereignty subservient to the judicial sovereignty of a foreign nation. Russian litigants will have a substantial advantage over domestic litigants in litigation in United States courts. While U.S. parties and foreign parties who are not Russian nationals will be subject to traditional service of process rules, including long-arm statutes, litigants who are Russian nationals will be able to hide behind the 1935 agreement, leaving the plaintiff's ability to obtain service of process wholly within the discretion of the Russian government.

Thus, if the Russian government refused to permit service via letters rogatory on the Russian defendant, the party who filed the suit in the U.S. court would have no way of obtaining service on the Russian defendant.

A. The Russian Legal System is Subject to Outside Influences

The U.S. Department of State has stated:

> Russia has a body of conflicting, overlapping and changing laws, decrees and regulations, which has resulted in an ad hoc and unpredictable approach to doing business. Independent dispute resolution in Russia can be difficult to obtain in a developing judicial system. Regional and local courts are often subject to political pressure.

U.S. Dept. of State, *FY 2001 Country Commercial Guide: Russia*, July 2001 at 47.

Without a stable judicial system in the Russian Federation, the United States should not cede control over whether a U.S. plaintiff can perfect service on a Russian defendant to a Russian court which is subject to outside influences.

1. *The Soviet Government has Already Protected Izvestia from a U.S. Lawsuit*

Izvestia is no stranger to American courts, having appeared as a defendant *in Kozorowski v. Russian Federation*, 1997 U.S. App. LEXIS 26266 (9th Cir. 1997), and, while not having filed an appearance, was served with process through diplomatic channels and failed to respond to the complaint in *Gregorian v. Izvestia*, 658 F. Supp. 1224 (C.D. Ca. 1987). In *Gregorian*, the Foreign Ministry of the U.S.S.R. rejected the U.S. State Department's diplomatic transmittal of the summons and complaint, citing "the principle of sovereign equality of states" and stating that "the Soviet State and its organs enjoy immunity from the jurisdiction of foreign courts." *Gregorian*, 658 F. Supp. at 1227. Had Konanykhine

(or any other U.S. plaintiff) attempted to serve Izvestia via letters rogatory pursuant to the 1935 agreement, the Russian Government could have, in their sole discretion, protected Izvestia from such a suit. Since Izvestia received such protection under the Soviet system, there is no reason to believe that it would not continue to receive such protection from the Russian Government.

2. *The Russian Government has Persecuted Konanykhine*

While in the dying Soviet Union and in the newly-born Russian Federation, Konanykhine was politically active and supported Russian President Boris Yeltsin's anti-corruption, pro-capitalist and pro-democratic policies by providing half of President Yeltsin's campaign funds. In mid-1992, several current or former KGB members kidnapped Konanykhine and seized control of his businesses under threat of death. Upon his escape from his kidnappers, Konanykhine fled to the United States, where he sought political asylum. In awarding Konanykhine political asylum, the United States Immigration Court found that the Russian government engineered false claims against Konanykhine in order to punish him for exposing corruption among Russian government and business officials. Just as it is likely that the Russian Government will protect Moscow's leading daily newspaper, *Izvestia*, from U.S. lawsuits, it is also likely that the Russian Government will not permit a pro-democracy and anti-corruption supporter living outside of Russia, such as Konanykhine, to perfect service on a high-profile Russian corporation. Therefore, because the Russian Government, at its sole discretion, can choose whether or not to allow service on a Russian defendant, it is illogical that the United States of America would have ever agreed to make the 1935 agreement the mandatory and exclusive method of perfecting service on a Russian defendant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MELISSA WARNER SCOGGINS
4129 Scotfield Drive
Chesapeake, VA 23321
(757) 465-3036

* Counsel of Record

JOHN PAUL SZYMKOWICZ *
JOHN THOMAS SZYMKOWICZ
SZYMKOWICZ & ASSOCIATES, P.C.
1899 L Street, N.W., Suite 250
Washington, DC 20036
(202) 862-8500

July 17, 2001

APPENDIX A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 5th *day of* March, 2001.

Record No. 002792
Circuit Court No. 97-1139

ALEXANDRE KONANYKHINE,
Appellant,

against

IZVESTIA NEWSPAPER, *et al.*,
Appellees.

From the Circuit Court of Arlington County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A copy,

Teste:

David B. Beach,
Clerk

By: /s/ WENDY L. TUCK
Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE
ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

ORDER

Upon consideration of the Motion of Defendants Izvestia and Editorial Staff of Izvestia to Vacate Default Judgment, the Memorandum of Points and Authorities in support of that Motion, the oppositions thereto, the oral argument before the Court on February 25, 2000, the record herein, and for the reasons stated from the bench, it is hereby:

ORDERED that the Motion be and hereby is GRANTED, and so the judgment entered against Defendants Izvestia Newspaper and Editorial Staff of Izvestia Newspaper is VACATED because service of process was not perfected pursuant to the "Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935," 49 Stat. 3849.

Dated: March 10, 2000

/s/
Judge William Newman
Arlington County Circuit Court

SEEN AND OBJECTED TO FOR THE REASONS STATED IN OPEN COURT:

SEEN AND OBJECTED:

/s/
JOHN C. KEENEY, JR.
RONALD J. WILTSIE, II
(VSB #30389)
KELLEEN MCGINNIS SCOTT
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5629

/s/
J.P. SZYMKOWICZ
(#39120)
SZYMKOWICZ & ASSOCIATES, P.C.
1899 L Street, N.W., Suite 250
Washington, DC 20036
(202) 862-8500

APPENDIX C

VIRGINIA:

IN THE
ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

FINAL ORDER

Upon consideration of the Motion to Quash March 9, 2000 Invalid Attempt at Service and to Dismiss Pursuant to Rule 3:3 filed by defendants Izvestia Newspaper and Editorial Staff of Izvestia Newspaper, the Memorandum of Points and Authorities in support of that Motion, the opposition thereto, the oral argument before the Court, the record herein, and for the reasons stated in the Court's letter opinion dated August 25, 2000, the Court hereby finds:

(1) The only proper means of service on defendants is through letters rogatory.

(2) Service via letters rogatory was not made and, so, service was not proper in this case.

(3) Defendants' law firm did not enter a general appearance in this Court and, so, could not be properly served.

Accordingly, it is hereby ORDERED that the Motion is GRANTED, that service be QUASHED as to these defendants, and that this case is DISMISSED.

Additionally, it being brought to the Court's attention that a Notice of Appeal in this matter has already been filed as of September 22, 2000 by plaintiff, it is hereby further ORDERED that this Order be entered *nunc pro tunc* to August 25, 2000, the date of the Court's letter opinion.

Dated: October 13th, 2000

/s/
WILLIAM T. NEWMAN, JR.
Circuit Court Judge

SEEN:

/s/
RONALD J. WILTSIE, II
(VSB #30389)
HOGAN & HARTSON, L.L.P
555 Thirteenth Street, N.W.
Washington, DC 20004-1109
(202) 637-5629

Of Counsel:

John C. Keeney, Jr.
Kelleen McGinnis Scott
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, DC 20004-1109

SEEN AND OBJECTED
TO ON ALL GROUNDS
ASSERTED ON BRIEF
AND AT ORAL ARGUMENT:

/s/
J.P. SZYMKOWICZ
(#39120)
SZYMKOWICZ &
ASSOCIATES, P.C.
1899 L Street, N.W., Suite 250
Washington, DC 20036
(202) 862-8500

APPENDIX D

Circuit Court of Arlington County
1425 North Court House Road
Arlington, Virginia 22201

August 25, 2000

RONALD J. WILTSIE, II, ESQ.
HOGAN & HARTSON
555 13th Street, N.W.
Washington, DC 20004

J.P. SZYMKOWICZ, ESQ.
SZYMKOWICZ & ASSOCIATES
1899 L Street, N.W., Suite 250
Washington, DC 20036

Re: ***Alexandre Konanykhine v. Izvestia Newspaper, et al.***
Law No. 97-1139

Dear Counsel:

The Court has before it Defendants' Motion to Quash Service and Motion to Dismiss. After oral argument, extensive briefing, and review and consideration by the Court, it is the ruling of the Court that service be quashed and that the action against Defendant Izvestia Newspapers be and is hereby dismissed.

Based on argument, the record, and the law, the Court finds that the only proper means of service on Defendant Izvestia Newspaper is through letters rogatory. No such service was made. Thus, service was not proper in this case. The Court further finds that Defendant's firm did not enter a general appearance in this Court as argued by Plaintiff, thus they could not be properly served.

Based upon these findings, the Court quashes service and dismisses this case.

Very truly yours,

/s/ William T. Newman, Jr.
Judge

APPENDIX E

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

FINAL JUDGMENT ORDER

This cause came before this Honorable Court on December 13, 1999 for a jury trial concerning the damages suffered by Plaintiff Konanykhine as alleged in his Motion for Judgment.

Prior to the jury trial concerning the damages suffered by Plaintiff Konanykhine as alleged in his Motion for Judgment, this Honorable Court granted Plaintiff Konanykhine's Motion for Entry of Judgment by Default against Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper.

Plaintiff Konanykhine appeared in person with his attorney and presented evidence as to the damages he suffered as a result of statements made by Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper.

Jurors were sworn to hear the evidence concerning the damages allegedly suffered by Plaintiff Konanykhine as a result of statements made by Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper. The jury, heard the evidence presented at trial, received this

Honorable Court's instructions, heard the closing arguments of counsel and retired to consider their verdict.

The jury returned a verdict awarding Plaintiff Konanykhine the sum of Thirty-three Million, Five Hundred Thousand Dollars ($33,500,000.00) against Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper.

Of the amount awarded by the jury, the sum of Three Million, Five Hundred Thousand Dollars ($3,500,000.00) represented compensatory damages and the sum of Thirty Million Dollars ($30,000,000.00) represented punitive damages.

IT IS HEREBY ORDERED THAT judgment be entered for Plaintiff Konanykhine against Defendant Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper, jointly and severally, in the amount of Thirty-three Million, Five Hundred Thousand Dollars ($33,500,000.00).

THIS ORDER IS FINAL.

December 16, 1999 /s/ WILLIAM T. NEWMAN, JR.
JUDGE
Arlington County Circuit Court

APPENDIX F

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

ORDER ENTERING JUDGMENT FOR PLAINTIFF KONANYKHINE AGAINST DEFENDANT EDITORIAL STAFF OF IZVESTIA NEWSPAPER

Upon consideration of Plaintiff Alexandre Konanykhine's Motion for Entry of Default against Defendant Editorial Staff of Izvestia Newspaper and Defendant Editorial Staff of Izvestia Newspaper's Response thereto, this Honorable Court hereby finds that more than twenty-one (21) days have elapsed since valid service of process was made upon Defendant Editorial Staff of Izvestia Newspaper and that Defendant Editorial Staff of Izvestia Newspaper has not filed any responsive pleadings nor has any appearance been made in this action on Defendant Editorial Staff of Izvestia Newspaper's behalf.

Therefore, it is this 17th day of April, 1998 HEREBY ORDERED THAT Default Judgment be entered against Defendant Editorial Staff of Izvestia Newspaper. IT IS FURTHER ORDERED THAT this matter be set down for a

hearing in front of a jury on the question of the amount of Plaintiff Konanykhine's damages.

4/17/98

/s/ BENJAMIN KENDRICK
JUDGE
Arlington County Circuit Court

APPENDIX G

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KONANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

ORDER ENTERING JUDGMENT FOR PLAINTIFF KONANYKHINE AGAINST DEFENDANT IZVESTIA NEWSPAPER

Upon consideration of Plaintiff Alexandre Konanykhine's Motion for Entry of Default against Defendant Izvestia Newspaper and Defendant Izvestia Newspaper's Response thereto, this Honorable Court hereby finds that more than twenty-one (21) days have elapsed since valid service of process was made upon Defendant Izvestia Newspaper and that Defendant Izvestia Newspaper has not filed any responsive pleadings nor has any appearance been made in this action on Defendant Izvestia Newspaper's behalf.

Therefore, it is this 17th day of April, 1998 HEREBY ORDERED THAT Default Judgment be entered against Defendant Izvestia Newspaper. IT IS FURTHER ORDERED THAT this matter be set down for a hearing in front of a jury on the question of the amount of Plaintiff Konanykhine's damages.

4/17/98

/s/ BENJAMIN KENDRICK
JUDGE
Arlington County Circuit Court

APPENDIX H

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 20th *day of* April, 2001.

Record No. 002792
Circuit Court No. 97-1139

ALEXANDRE KONANYKHINE,
Appellant,

against

IZVESTIA NEWSPAPER, *et al.*,
Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 5th day of March, 2001 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy,

Teste:

/s/ DAVID B. BEACH
Clerk

APPENDIX I

EXECUTION OF LETTERS ROGATORY

Exchange of notes at Moscow November 22, 1935; related note of January 19, 1937

Entered into force November 22, 1935

49 Stat. 3840; Executive Agreement Series 83

EXCHANGE OF NOTES

The American Ambassador to the People's Commissar for Foreign Affairs

EMBASSY OF THE UNITED STATES OF AMERICA
MOSCOW, *November 22, 1935*

EXCELLENCY:

Confirming conversations between the American Embassy in Moscow and the People's Commissariat for Foreign Affairs with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of courts in the other, I have the honor to inform you of the conditions under which and the manner in which courts in the United States may execute letters rogatory issuing out of courts in the Union of Soviet Socialist Republics.

(1) Letters rogatory issuing out of courts in foreign countries are executed in the United States in accordance with the pertinent provisions of the laws of the United States, or of the State or Territory thereof in which resides the person whose testimony is desired, and in compliance with the rules of the executing court. The Government of the United States is, accordingly, not in a position to set forth with precision what may be the requirements of a particular court in the United States at a given time in respect of the execution of letters rogatory issuing out of a court in a foreign country. There are

appended, however, copies of the texts of federal statutory provisions now in force which relate to the taking of testimony under commissions or letters rogatory addressed by foreign courts to federal courts of the United States.

It is understood that it is the practice of American courts of appropriate jurisdiction to execute letters rogatory issuing out of foreign courts, if properly prepared and presented, and that no difficulty is likely to be encountered by Soviet courts in obtaining the execution of letters rogatory by American courts. However, should a Soviet court encounter such difficulty, my Government would, it is understood, upon its attention being drawn thereto through the diplomatic channel, consider what steps it might appropriately take with a view to eliminating the difficulty.

(2) With respect to the question of the manner of transmittal of letters rogatory issuing out of courts in the Union of Soviet Socialist Republics and addressed to courts in the United States, I have the honor to say that neither the Department of State nor any other part of the Executive Branch of the Government of the United States makes a practice of acting as a channel for the transmittal of letters rogatory issuing out of courts in foreign countries and addressed to courts in the United States. In some States of the United States, laws have been enacted requiring letters rogatory to be presented to the State court by the appropriate consular officer of the country in which the testimony is to be used. As my Government is of the opinion that this practice should generally be followed with respect to both Federal and State courts, letters rogatory issuing out of a court in the Soviet Union for execution in the United States should be presented to the court to which they are addressed by the consular officer of the Union of Soviet Socialist Republics in the United States within whose consular district the court in question is located.

(3) While my Government is not, as has been stated above, in a position to set forth with precision what the requirements of

a particular court in the United States may be at a given time in respect of the execution of letters rogatory issuing out of a court in a foreign country, my Government desires me to suggest the following points which courts in the Union of Soviet Socialist Republics may find it advantageous to observe in preparing letters rogatory for execution in the United States:

(a) The letters rogatory should be addressed by name to the court in the United States which is to execute them, if that is known; or they may be addressed "To any court of competent jurisdiction in the United States".

(b) Requests for the execution of letters rogatory should specify the name of the court out of which they issue, as well as the names of the parties to the action in which the testimony called for by the letters rogatory is desired.

(c) Requests for the execution of letters rogatory should be accompanied by English translations thereof and of accompanying documents such as exhibits and any instructions to the executing court.

With respect to the service of documents on Soviet nationals in the United States in connection with cases pending in courts in the Soviet Union, my Government has informed me that, while it cannot undertake to obligate courts or officials in the United States, no restrictions are known to exist upon the service of such documents without the application of coercion by Soviet diplomatic and consular officers in the United States.

Accept, Excellency, the renewed assurances of my highest consideration.

WILLIAM C. BULLITT

His Excellency
MAXIM M. LITVINOV
People's Commissar for Foreign Affairs
Moscow

[enclosure]

EXCERPTS FROM TITLE 28, UNITED STATES CODE

"653. * * * When letters rogatory are addressed from any court of a foreign country to any district court of the United States, a commissioner of such district court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (R.S. § 875; Feb. 27, 1887, C.69, § 1, 19 Stat. 241)".

Testimony for use in foreign countries

"701. *Taking*. The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same, and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters. When counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory exclude such additional interrogatories.

The summons shall specify the time and place at which the witness is required to attend, which place shall be within one hundred miles of the place where the witness resides or shall be served with such summons. (R.S. § 4071)".

"702. *Privilege of witness.* No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign State. (R.S. § 4072)".

"703. *Punishment of witness for contempt.* If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with section 701 of this title, or if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit in the district court of the United States. (R.S. § 4073)".

"704. *Fees and mileage of witnesses.* Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States. (R.S. § 4074)".

The People's Commissar for Foreign Affairs to the American Ambassador
MOSCOW, *November 22, 1935*

MR. AMBASSADOR:

Confirming conversations between the People's Commissariat for Foreign Affairs and the American Embassy in Moscow with regard to the desirability of setting forth the procedure followed in our respective countries in the matter of the execution of letters rogatory issuing out of the courts in

the other, I have the honor to inform you of the procedure according to which the courts of the Union of Soviet Socialist Republics will accept for execution letters rogatory of courts in the United States of America.

1. Letters rogatory issuing out of courts in the United States for execution in the Union of Soviet Socialist Republics should be delivered through the diplomatic channel, i.e., through the American Embassy in Moscow and the People's Commissariat for Foreign Affairs, to the appropriate court in the Union of Soviet Socialist Republics and, when executed, they will be returned through the same channel.

2. Letters rogatory issued out of a court in the United States forwarded for execution in the Union of Soviet Socialist Republics should be addressed to the Supreme Court of that constituent republic which is competent to execute such letters rogatory. In case the exact title of the Soviet court is unknown to the court which issues the letters rogatory, the letters rogatory may be addressed "to the competent court of the Union of Soviet Socialist Republics".

3. Requests of courts in the United States for the execution of letters rogatory addressed to courts in the Union of Soviet Socialist Republics should specify the name of the court out of which they issue, as well as the names of the parties to the action in which the testimony called for by the letters rogatory is desired.

4. Requests for the execution of letters rogatory should be accompanied by Russian translations of all the basic documents, such as the interrogatories themselves and any accompanying instructions to the executing court. It will be sufficient in the case of documents of secondary importance to forward short summaries of their contents in the Russian language.

5. Depending upon the nature of the letters rogatory, a fee varying from five to ten dollars ($5 to $10) will be charged

for the execution of letters rogatory issued out of courts in the United States. In addition to this fee, remuneration for the services of experts as well as for the travelling expenses and expenditure of time by witnesses may be requested in individual cases, such remuneration to be based on rates current at that time fixed by law or regulation then existing. Payment of fees and other possible expenses of the nature referred to above will be effected in dollars by the American Embassy at Moscow upon receipt from the People's Commissariat for Foreign Affairs of the executed letters rogatory and an appropriate statement setting forth the amount due, and the fees and services covered thereby.

6. The court in the Union of Soviet Socialist Republics by which the letters rogatory are executed shall give effect to them in accordance with the procedural rules obtaining in the Union of Soviet Socialist Republics.

7. The court issuing the letters rogatory shall, if it so desires, be informed of the date and place where the proceedings will take place, in order that the interested parties or their legal representatives may, if they desire, be present.

8. The execution of letters rogatory issuing out of a court in the United States may be refused in whole or in part, if the appropriate authorities in the Union of Soviet Socialist Republics consider that the execution thereof would affect its sovereignty or safety. In returning letters rogatory unexecuted in whole or in part, the authorities refusing such execution shall affix under seal to the letters rogatory a written statement of the reasons for such refusal.

9. Any difficulties which may arise in connection with a request by a court in the United States for the execution of letters rogatory in the Union of Soviet Socialist Republics shall be settled through the diplomatic channel.

While letters rogatory must be transmitted through the diplomatic channel, American diplomatic and consular

institutions may, in connection with cases pending in the United States courts, serve juridical documents on American nationals within the Union of Soviet Socialist Republics, without the application of coercion.

Accept, Mr. Ambassador, the renewed assurances of my highest consideration.

M. LITVINOFF

Mr. WILLIAM C. BULLITT
Ambassador of the United States of America
Moscow

RELATED NOTE

The Vice Director of the Legal Division of the People's Commissariat for Foreign Affairs to the American Chargé d' Affaires ad interim

COMMISSARIAT DU PEUPLE
POUR LES AFFAIRES ETRANGERES

MOSCOW, *January 19, 1937*

DEAR MR. HENDERSON,

Confirming our recent conversation I have the honor to inform you that in view of legislation now in force in the Union of Soviet Socialist Republics the payment of fees and other possible expenses to be charged for the execution of letters rogatory in accordance with the note of the Soviet government of November 22, 1935, should be effected in Soviet currency, the amounts to be paid in rubles to form the equivalent of the fees expressed in dollars in the above-mentioned note.

Sincerely yours,

M. PLOTKIN

Mr. LOY W. HENDERSON
Chargé d'Affaires ad interim
of the United States of America
Moscow, U.S.S.R.

APPENDIX J

Izvestia Letterhead
(Letterhead was in Russian, remainder of pleading was in English)

07.05.98 No. 140/02.1-3

FILED
JUN 23 1998
DAVID A. BELL, CLERK
Arlington County Circuit Court
By _____ Deputy Clerk

USA, Virginia
District court Arlington

On the fifth of February we had honour to send You our answer to the claim of Mr. Alexander Kononykhin.

In the received by us copy of claimant's advocates letter addressed to the court there is an assertion that we allegedly did not react to the court's notice about the claim occurrence.

Being aware that the post office on some reasons may have not delivered to the court our answer to the A. Kononykhin claim, we are sending You a copy of this answer.

Annex—our answer 2 pages.

With high regards

/s/ D. MURZIN

Izvestia Letterhead
(Letterhead was in Russian, remainder of pleading was in English)

USA, VIRGINIA
District court Arlington

OAO "Editorial staff "Izvestija" witnesses its esteem towards the District court Arlington. As for the claim of Mr. Alexander Konanykhin which came in to us we have the honour to report the following.

I

Publications about the plaintiff that occurred in "Izvestija" are completely based upon the information received from General Procurator office of the Russian Federation which proceeds investigations concerning A. Konanykhin.

In accordance with Paragraph 3 article 57 Law of Russian Federation "Mass media activities", Editorial staff and journalists are not responsible for the dissemination of data "if these data are inserted in answer to request about information". Information disputed by the plaintiff was not only received according to an inquiry on the part of Editorial staff contributors; but it had been sent by the General Procura-tor office of Russia to FBI.

II

In harmony with Article 117 Civil Processual Code of RF cases about claims toward mass media editorial staffs have to be considered in courts at whereabouts of defendants.

Plaintiff is a citizen of Russia, address of our Editorial office is well know to him. So the plaintiff and his advocates have no hindrances to bring a claim to Russian defendant at territory of Russia and according to Russian laws.

III

Indicated in claim of Konanykhin as defendant firm IRI is no "Izvestija" property. According to our information this firm is currently liquidated.

With high regards

OAO 'Editorial staff Izvestija'
/s/ D. MURZIN
President

APPENDIX K

FORUM FINANCIAL GROUP, LLC, *ET AL.*, PLAINTIFFS v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE, *ET AL.*, DEFENDANTS

CIVIL NO. 00-306-P-H

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

199 F.R.D. 22; 2001 U.S. Dist. LEXIS 5961

February 16, 2001, Decided

MEMORANDUM DECISION AND ORDER ON PLAINTIFFS' MOTION FOR COURT-DIRECTED SERVICE OF PROCESS

The plaintiffs have moved for court-directed service of process under Federal Rule of Civil Procedure 4(f)(3). They have been unsuccessful in their own attempts to serve the defendant Jonathan Hay, an American who, they assert, resides in Russia. Specifically, the plaintiffs have requested court-directed service upon Hay by certified mail to his attorney, Jonathan S. Spiegel, Esq. of Skadden, Arps, Slate, Meagher & Flom, LLP in New York City. Attorney Spiegel recently accepted service on Hay's behalf in another federal case that, like this one, involves Hay's business dealings in Russia. The plaintiffs have also moved that I deem such service "good and sufficient." I GRANT the plaintiffs' motion insofar as it requests court-directed service upon Hay by certified mail to Attorney Spiegel, but I cannot determine at this time whether any resulting service is "good and sufficient" and therefore DENY that part of the motion.

Federal Rule of Civil Procedure 4(f) provides that service upon individuals in a foreign country may be accomplished:

> (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[1]; or
>
> (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
>
> > (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
> >
> > (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
> >
> > (C) unless prohibited by the law of the foreign country, by
> >
> > > (i) delivery to the individual personally of a copy of the summons and the complaint; or
> > >
> > > (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
>
> (3) by other means not prohibited by international agreement as may be directed by the court.

Attorney Spiegel, opposing the plaintiffs' motion,[2] first contends that court-directed service under Rule 4(f)(3) is not

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[1] Russia is not a signatory, to the Hague Convention on the Service Abroad of Judicial and Extrajudicial documents.

[2] It is unclear whether the Plaintiffs' motion is properly opposed. To be sure, Attorney Spiegel submitted a letter arguing that the motion should be denied, but in doing so he disclaimed any intent to make an appearance in this litigation. Furthermore, Spiegel's letter forthrightly

generally available unless attempts at service by means authorized by any applicable international agreement have proven unsuccessful. He asserts that court-directed service is "extraordinary relief" that is inappropriate in this case because the plaintiffs have not attempted to serve Hay by letter rogatory. He asserts that the latter method is allowed under a 1935 agreement between the United States and the Union of Soviet Socialist Republics (U.S.S.R.). *See Exchange of Notes Relating to the Execution of Letters Rogatory, Nov. 22, 1935*, U.S.-U.S.S.R., 49 Stat. 3840, E.A.S. No. 83 (the "1935 Agreement"). Contrary to these assertions, nothing in Rule 4(f) or its advisory committee notes indicates that court-directed service under Rule 4(f)(3) is "extraordinary relief." By its plain language and syntax, Rule 4(f)(3)'s alternative is not a last resort, nor is it any less favored than service under subsections (1) and (2).[3] Rule 4(f)'s plain language unambiguously indicates that the only limit it imposes on court-directed service under

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noted that he is not admitted to practice in the District of Maine (and he has not been admitted *pro hac vice*) and states that he is not authorized to appear in this action of Hay's behalf. Because I grant the plaintiffs' motion, any issues these shortcomings might raise otherwise are of no present importance.

[3] The court's contrary statement in *Graval v. P.T. Bakrie & Bros.*, 986 F. Supp. 1326, 1330 (C.D. Cal. 1996), is based on the following advisory committee notes regarding Rule 4(f)(2): "Service by methods that would violate foreign law is not generally authorized. Subparagraphs (A) and (B) [of Rule 4(f)(2)] prescribe the more appropriate methods for conforming to local practice or using a local authority." In my view, that language simply does not address Rule 4(f)(3). Rather, it indicates only that under Rule 4(f)(2) service by means in accordance with the foreign country's law or as directed by the appropriate foreign authority is preferred over service by means merely not prohibited by the foreign country's laws. I will not extend the notes to stand for the proposition, contrary to the plain language of Rule 4(f)(3), that service under Rule 4(f)(2)(A) and (B) should or must be attempted before court-directed service under Rule 4(f)(3) is allowed.

Rule 4(f)(3) is that the means must not be prohibited by international agreement. *Accord* David D. Siegel, Supplementary Practice Commentary C4-24, 28 U.S.C.A. Fed. R. Civ. P. 4, at 73 (West Supp. 2000) ("It is only a method barred by 'international agreement', and presumably *specifically* barred by that agreement, that the court must stay away from.") (emphasis in original). Moreover, the 1935 Agreement between the United States and U.S.S.R. — if it is even applicable[4] — merely sets forth procedures for executing letters rogatory; it does not prohibit other means of service. Because no international agreement prohibits me from directing service on Hay via certified mail to Spiegel, neither does Rule 4(f)(3).

Attorney Spiegel also contends that, apart from any Rule 4(f) concerns, service on a party through an attorney who is not authorized to accept such service (he states he is not authorized) is generally inappropriate because it risks adversely affecting the attorney-client relationship. This contention is important, and Attorney Spiegel cites several cases standing for the proposition that, in the ordinary course, service of process on a party via his or her attorney is not effective unless that attorney is authorized to accept service. *See, e.g.*, *Williams v. Jones*, 11 F.3d 247, 251 (1st Cir. 1993) ("'Service of process is not effectual on an attorney solely by reason of his capacity as an attorney, [but] the party must have appointed his attorney as his agent for service of process.'") (*dicta*) (alterations in Williams) (*quoting Durbin*

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[4] The continuing validity and applicability of the 1935 Agreement with the U.S.S.R. (not Russia) is unclear. Compare *Semtek Int'l Inc. v. Merkuriy Ltd.*, 1996 U.S. Dist. LEXIS 22248, *5 (D. Mass. 1996) (stating that service in Russia is proper if accomplished by means of a letter rogatory pursuant to the 1935 Agreement) with U.S. Dep't of State, Judicial Assistance in the Russian Federation, available at http://travel.state.gov/russia_legal.html (last visited Feb. 16, 2001) ("At present, no bilateral agreement on judicial assistance exists between the United States and Russia.").

Paper Stock Co. v. Hossain, 97 F.R.D. 639, 639 (S.D. Fla. 1982); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1094 (2nd Cir. 1990) ("Service of process on an attorney not authorized to accept service for his client is ineffective."). Those cases are distinguishable, however, because they do not involve court-directed service as is requested here, but only the parties' own attempts at service without prior court authorization. *See Int'l Telemedia Assocs., Inc. v. Diaz*, 245 B.R. 713, 720-21 & n.6 (N.D. Ga. 2000) (directing service under Rule 4(f)(3) on a foreign defendant by electronic mail and distinguishing a case rejecting service by electronic mail where the court's prior authorization had not been obtained). Where, as here, a party moves for court-directed service under Rule 4(f)(3), the court's decision to grant or deny the motion after careful consideration of the particular facts of the case can safeguard the attorney-client relationship against any unwarranted intrusion. *Cf. Mayatextil v. Liztex*, 1994 U.S. Dist. LEXIS 6663, 1994 WL 198696, *5 (S.D.N.Y. 1994) ("Absent some proffer of how service on counsel under the facts of this case is inadequate to provide fair notice, counterclaim defendants' sweeping objections are insufficient to overcome the obvious need for court-designed service."); *Int'l Telemedia*, 245 B.R. at 719 (stating that Rule 4(f)(3) provides flexibility and discretion that empowers courts to "fit the manner of service utilized to the facts and circumstances of the particular case"); *Siegel*, *supra*, at 73 ("Paragraph (3) of subdivision (f) is a catch-all provision that enables the court on *ex parte* motion to devise a method of service responsive to the unique facts of the case."). In this case, based upon the representations made at this point in the proceedings,[5] I conclude that service of process via Spiegel is

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[5] Employing local counsel in Russia, the plaintiffs have attempted to serve Hay by certified mail and by hand, at both his home and business addresses. Chizhikova Decl. P 7. The plaintiffs' local counsel asserts that Hay has actively evaded her efforts to serve him, *id.*, that he is now living under an assumed name, and that she cannot find him. Supplemental

appropriate given Hay's efforts to evade service in Russia and Spiegel's recent acceptance of service on Hay's behalf in a case also involving Hay's business dealings in Russia, *United States v. President & Fellows of Harvard College*, Civ. No. 00-11977DPW (D. Mass filed Sep. 26, 2000). Such service via Attorney Spiegel is likely to fulfill the due process requirement of being reasonably calculated to give Hay notice of the case and an opportunity to be heard. *United States v. One Urban Lot*, 885 F.2d 994, 998-99 (1st Cir. 1989) ("Well-known and oft-repeated Supreme Court precedent states that notice of a legal proceeding satisfies due process even if not-actually received so long as 'notice is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'") (*quoting Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950)). Notably, Attorney Spiegel does not argue that sending service to him would fail to give Hay fair notice, nor does he assert that he is not in contact with Hay.

I do not decide whether court-directed service on Hay via Attorney Spiegel complies with Russian law. That element does not affect my Order, but it may very well affect the plaintiff's ability ultimately to enforce any judgment in Russia.

SO ORDERED.

DATED THIS 16TH DAY OF FEBRUARY, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

Chizhikova Decl. P 4. The plaintiffs also assert that they would be prejudiced if forced to attempt to serve Hay by letter rogatory because the attempt would not be successful but would take between six months and one year to complete. Pl.'s Reply to Opp'n to Mot. for Court-Directed Service at 5.

APPENDIX L

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

1996 U.S. Dist. LEXIS 22248

C.A. NO. 95-11820-RCL

SEMTEK INTERNATIONAL INCORPORATED,
Plaintiff,

v.

MERKURIY LTD. and PYOTR SIVIRIN,
Defendants.

August 13, 1996, Decided

MEMORANDUM AND ORDER

Lindsay, District Judge.

This case is before the court on the defendants' motion pursuant to Fed. R. Civ. P. 60(b)(4) to vacate the default judgment entered against them on April 24, 1996. The defendants contend that they were improperly served in the Russian Federation ("Russia"), and that therefore, this court lacks personal jurisdiction over them. For the reasons set forth below, the motion is GRANTED and the plaintiff's service upon the defendant is quashed and the default judgment against the defendants is VACATED.

A. *Relevant Facts*

Following is a summary of the material facts taken from the affidavits of Leslie N. Reizes, plaintiff's counsel, and defendant Pyotr Sivirin. These facts are not in dispute.

On August 15, 1995, the plaintiff, Semtek International Incorporated ("Semtek"), a Massachusetts company, filed a complaint in this court against the defendants, a Russian company, Merkuriy Ltd. ("Merkuriy") and its Director, Pyotr Sivirin ("Sivirin"), a Russian national domiciled and residing in Siberia. The suit stems from an alleged joint venture agreement between Semtek and Merkuriy to make Russian-owned satellites available on the international telecommunications market.

The plaintiff first attempted service of process on August 21, 1995, by mailing the following items to the defendants at Sivirin's address in Siberia: the complaint, a request for waiver of service of summons, an international reply coupon for return of the waiver, and a letter of transmittal that read "if they are not returned to me in a timely manner, under the treaty between the United States and Russia, I will have to have the summons and complaint translated and served upon you through diplomatic channels of the United States and Russia." All of the documents were in English only.

Sivirin, who speaks no English, received the documents, and forwarded them to his attorney, Nikolay V. Prokhorov ("Prokhorov"), in Moscow, Russia. Prokhorov also represents the Merkuriy company.

On September 18, 1995, Prokhorov responded to the attempted service by faxing a letter to plaintiff's counsel. The waiver form was not returned. In his letter, Prokhorov stated that service upon his clients had been improper and that his clients would not pay attention to any judicial papers "if not served in Russia in accordance with the *Convention de la Haye of October 5, 1961*".

The plaintiff's counsel replied to Prokhorov's letter on September 22, 1995, by asking the defendants to reconsider accepting informal service of process. Prokhorov responded by facsimile letter on September 29, 1995, stating that the United States and Russia recognize the Hague Convention of

1961 and that Russia has a right not to accept service that is "in contradiction with the mutual international obligations of Russia and the countries from which the documents are served."

On December 5, 1995, the plaintiff attempted to serve the defendants in Russia for a second time. This second service was made in accordance with the *Hague Convention of 1965 on the Service Abroad of Judicial and Extrajudicial Documents*, 28 U.S.C., Fed. R. Civ. P. 4. The plaintiff sent the summons and complaint, together with a Russian translation, to the defendants by registered mail.

Sivirin claims that he never received the documents that the plaintiff sent to him in this second attempt at service. Prokhorov, however, received for Merkuriy the documents that were sent to him in Moscow.

Neither of the defendants answered the complaint, a default judgment was entered against them on April 24, 1996 for $381,396,000.

B. *Discussion of the Law*

1. *Standard for Proper Service in Russia*

Service upon both individuals and corporations in a foreign country is governed by 28 U.S.C., Fed. R. Civ. P. 4(f). Rule 4(f)(1) states that service in a foreign country may be effected by "any internationally agreed means reasonably calculated to give notice". "When service is to be effected outside a judicial district of the United States, the methods of service appropriate under an applicable treaty shall be employed if available." *See Advisory Committee Notes to the 1993 Amendments to the Federal Rules of Civil Procedure.*

There is a mutually-agreed upon means of service of process between Russia and the United States: the "*Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow*

November 22, 1935" (the "Moscow Agreement"), codified as 49 Stat. 3849; Executive Agreement Series 83. Pursuant to the Moscow Agreement, the service of United States judicial documents upon a defendant in Russia is proper if it is accomplished by means of a letter rogatory.

In this case, the plaintiff attempted service by mail, not letters rogatory. The plaintiff claims that letters rogatory, while sufficient, are not the exclusive means of service in Russia because there is nothing in the Moscow Agreement that precludes other forms of service. The plaintiff contends that his second service by mail was proper because it is one of the alternative methods that are listed in Rule 4(f)(2)(C).

Pursuant to Rule 4(f)(2)(C)(ii), service may be effected by "any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the party to be served." In this case, the documents were addressed and dispatched from Ithaca, New York by plaintiff's counsel, and not the clerk of this court as required by (f)(2)(C)(ii). Thus, even if service by mail were proper in this case, sufficient service was not effected under (2)(C)(ii) because the summons and complaint were improperly dispatched. Service by mail is improper if addressed and dispatched by the plaintiff rather than by the clerk of the court as required by Rule 4(f). *G & H Partners v. Boer Goats International Limited*, 896 F. Supp. 660, 663 (W.D. Tex. 1995); *See* Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure*, Vol 4A § 1134 at 58 (1996 Supp.).

Moreover, Rule 4(f)(2) precludes service upon a foreign defendant which would violate the law of the country in which service is to be made. Rule 4(f)(2)(A) requires that service be made "in the manner prescribed by the law of the foreign country." Rule 4(f)(2)(C) allows for service "unless prohibited by the law of the foreign country". The only time that service may be accomplished in contravention of the laws of the foreign country is by order of the court.

Rule 4(f)(3). No such order was ever sought or granted in this case.

While there is nothing in the Moscow Agreement which explicitly precludes other methods of service other than letters rogatory, a Supreme Soviet decree strongly indicates that this is the case. *"Acknowledgment of the Decisions of Foreign Courts and Courts of Arbitration in the U.S.S.R 9131-xi"*, 26 Vedomosti SSSR item 427 (1988). According to the directive, which Russia has recognized since 1991, the one exception to service by letters rogatory is service by an agent or through international registered mail with prior permission from a Russia court.

Moreover, the General Counsel of the Administrative Office of the United States Courts has advised all district courts that service by mail is not acceptable in Russia. *Memorandum of General Counsel of the Administrative Office of the United States Courts, "Service of Process in Foreign Countries"* (November 6, 1980). The memorandum requests that clerks of court "refrain from sending summonses and complaints by international mail to foreign defendants in those countries which have protested service by international mail, namely Czechoslovakia, Switzerland, and the Union of Soviet Socialist Republics. *In those countries, letters rogatory are the appropriate mechanism for service.*" (italics in the text).

In this case, the plaintiff served the defendant by international registered mail, but without permission of a Russian court. Service in this manner did not comport with the Moscow Agreement, and it directly contravened the 1988 Supreme Soviet directive.

2. *The Issue of Waiver of Service*

The plaintiff claims that the defendants have waived any objection to the manner of service because service was made as defendants requested. This assertion is simply wrong.

Defense counsel asked for service in accordance with the Hague Convention of *1961*, namely the *Hague Convention of 1961 Abolishing the Requirement of Legalization for Foreign Public Documents*, this convention eliminates the system of authentication procedures of foreign public documents and relates to Fed. R. Civ. P. 44(a)(2). It does not recite any information with regard to service of process. The plaintiff, however, served the defendants in accordance with the Hague Convention of 1965. The defendants never requested or agreed to service by the terms of the Hague Convention of 1965. Thus even if service were waived, the waiver was conditional, and the plaintiff failed to meet those conditions.

The plaintiff next claims that defense counsel waived service of the summons and complaint by acknowledging receipt of the complaint in two facsimile letters he sent to the plaintiff. The plaintiff contends that this response supports the proposition that the defendants had received sufficient notice of the complaint that had been filed against them. Defense counsel's acknowledgment of receipt of service does not constitute waiver of service for purposes of Rule 4. "Actual notice itself, without more, is insufficient to satisfy the requirements of 4(d)(1)." *DeFazio v. Delta Air Lines, Inc.*, 849 F. Supp. 98, 103 (D. Mass. 1994) *aff'd*, 34 F.2d 1065 (1st Cir. 1994), *citing Precision Etchings and Findings, Inc. v. LGP Gem, Ltd.*, 953 F.2d 21, 24 (1st Cir. 1992).

Speaking generally and as to both claims of waiver, this court notes that Rule 4(d) details the manner in which formal service may be waived by a defendant. A plaintiff wishing to take advantage of the waiver procedure must satisfy the requirements of Rule 4(d)(2). In order to waive formal service, a defendant must sign and return the waiver form "1B", which was adopted as part of the 1993 Amendments to the Federal Rules of Civil Procedure.

The defendants never completed, nor returned, any waiver form to the plaintiff or to any court in the United States.

Thus, the defendants cannot be judged to have waived their right to service.

C. *Service Must be Quashed*

"The courts have broad discretion to dismiss the action or to retain the case but quash the service that has been made on the defendant," when improper service has been made. Wright and Miller, Vol. 5A § 1354 at 288. Dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiff's free to effect proper service. *Richardson v. Ingram Corp.*, 374 F.2d 502, 503 (3rd Cir. 1967) *cert. denied*, 389 U.S. 866, 19 L. Ed. 2d 139, 88 S. Ct. 134 (1967). *See also Sherer v. Construcciones Aeronauticas, S.A.*, 987 F.2d 1246 (11th Cir. 1993), *cert. denied* 510 U.S. 818, 114 S. Ct. 72, 126 L. Ed. 2d 41 (1993). It appears that proper service still is possible in this case. Accordingly, the court will quash service, retain the case on its docket and give the plaintiff an opportunity properly to serve the defendants.

D. *Conclusion*

For the foregoing reasons, service of the summons and complaint upon the defendants is quashed and the defendants' motion to vacate the default judgment is GRANTED. Service shall be made within 120 days of the date of this order unless otherwise ordered by the court.

SO ORDERED.

Reginald C. Lindsay

United States District Judge

DATED: 8/13/96

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 97-10409-GAO

J L REARDON ASSOCIATES, LTD.,
Plaintiff,

v.

NPO ENERGOMASH; ENERGO, INC.; R.D. AMROSS, L.L.C.; PRATT & WHITNEY GOVERNMENT ENGINES AND SPACE PROPULSION COMPANY, a unit of UNITED TECHNOLOGIES CORP.; BORIS I. KATORGIN; GENNADY G. DERKACH, and VICTOR A. SIGAEV,
Defendants,

and

R.D. AMROSS. L.L.C.; UNITED TECHNOLOGIES CORP.; and LOCKHEED MARTIN CORPORATION,
Reach and Apply Defendants.

MEMORANDUM AND ORDER
March 26, 1998

O'TOOLE, D.J.

The claims in this action all stem from a series of agreements between plaintiff J.L. Reardon Associates, Ltd. ("Reardon Associates"), a Massachusetts corporation, the defendant NPO Energomash ("Energomash"), a Russian corporation under the control of the Russian Space Agency, and its subsidiary, the defendant Energo, Inc. ("Energo'), a Delaware corporation with a principal place of business in Khimky, Russia.

The relationship between the parties began on August 29, 1990, when, pursuant to a written contract, Energomash appointed Reardon Associates as its sole representative in North America for the development and negotiation of sales regarding Energomash's rocket engine technology. After several years and a series of agreements restructuring the original one, the relationship has degenerated to the point where Reardon Associates filed this suit alleging a variety of claims against Energomash, Energo, several individual directors of Energo and representatives of Energomash, Amross, L.L.C. ("Amross"), and Pratt & Whitney Government Engines and Space Propulsion Company ("Pratt & Whitney").

Presently, five motions are before the Court.

1. *Motion to dismiss by Amross*

The complaint alleges the tort of intentional interference with contractual relations against Amross (Count VII). Amross moves to dismiss for lack of personal jurisdiction or, in the alternative, to dismiss for failure to state a claim upon which relief can be granted. In assessing this motion to dismiss for lack of personal jurisdiction, it is appropriate to use the *prima facie* standard of analysis, considering "only whether the plaintiff has proferred evidence that, if credited, is enough to support findings of all facts essential to personal jurisdiction." *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992).

Amross is a Delaware limited liability company with a usual place of business in Florida. It is a joint venture, established in July 1996 to manage the production and sale of an Energomash liquid-fueled rocket engine to the Lockheed Martin Corporation in conjunction with Lockheed Martin's development of the Atlas space vehicle. Reardon Associates does not dispute that Amross itself has had no contact with Massachusetts, but argues that this Court has personal

jurisdiction over Amross under the section of the Massachusetts long-arm statute which holds that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or in equity arising from the person's . . . causing tortious injury by an act or omission in this commonwealth." Mass. Gen. L. ch. 223A. § 3(c). Reardon Associates argues that "[i]n the instant case, the claims are directly related to the acts or omissions of Amross, its agents or co-conspirators which were intended to — and did — cause injury in Massachusetts." (Pl.'s Opp'n to Def. R.D. Amross' Mot. to Dismiss at 2.)

First. Reardon Associates claims that Amross intentionally and improperly induced Energomash to breach its contract with Energo and Reardon Associates, and induced Energo to breach its contract with Reardon Associates, thereby causing injury in Massachusetts. It appears that Reardon Associates misunderstands the long-arm statute. "By its terms § 3(c) requires not only 'tortious injury' in Massachusetts, but also an act there." *Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1027 (2d Cir. 1997). Reardon Associates does not allege that Amross acted tortiously or otherwise in Massachusetts.

It may be that Reardon Associates meant to allege that Amross committed a tortious act *outside* the commonwealth that caused injury in the commonwealth, a circumstance suggesting jurisdiction under § 3(d) of the long-arm statute, but only if the alleged tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, . . . in this commonwealth." There is no evidence in this record that this critical condition has been satisfied. Neither §§ 3(c) nor 3(d) provides a basis for jurisdiction over Amross.

Reardon Associates also argues that Energomash and Pratt & Whitney (which jointly own Amross) are "agents' of

Amross, so that Amross can be sued for the acts of its agents. However, Reardon Associates does not explain how Energomash and Pratt & Whitney can be considered its "agents."[1]

Reardon Associates also argues weakly, without any substantial factual support. that Amross should be considered a co-conspirator of Energomash and Pratt & Whitney and others within the reach of the Massachusetts long-arm statute. *See Glaros v. Perse*, 628 F.2d 679, 681 (1st Cir. 1980). No basis for such jurisdiction appears.

For the foregoing reasons, Amross motion to dismiss for lack of personal jurisdiction is GRANTED.

2. *Pratt & Whitney's Motion to Dismiss all Substantive Counts*

Reardon Associates brings two counts against Pratt & Whitney, alleging intentional interference with contractual relations (Count VII) and fraud (Count X). Pratt & Whitney has moved to dismiss Count VII for failure to state a claim, and Count X for failure to plead fraud with particularity.

The claim of intentional interference with contractual relations requires proof of: (1) the existence of a business or contractual relationship; (2) the defendant's knowing interference with that relationship; (3) improper means or motive on the part of the defendant; and (4) damages. *Cigna Fire Underwriters Co. v. MacDonald & Johnson, Inc.*, 86 F.3d

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[1] Normally, when an agency relationship is asserted between a subsidiary company and its parent, a plaintiff is seeking to hold a parent liable for the acts of its subsidiary, not the other way around. It may be theoretically conceivable that a subsidiary could be held liable for the actions of a parent corporation. However, Reardon Associates actually alleges that Energomash and Pratt & Whitney "participate in and control Amross." (Pl.'s Opp'n to Def. Amross' Mot. to Dismiss at 3.) In light of this allegation, it might be that Amross was an agent of Energomash and Pratt & Whitney, but not the other way around.

1260, 1267 (1st Cir. 1996). In the complaint, Reardon Associates alleges contractual relationships between Reardon Associates and Energomash, and between Reardon Associates and Energo. Reardon Associates further alleges that Pratt & Whitney entered into a contract with Energomash that was in direct violation of Reardon Associates contract. Pratt & Whitney argues that Reardon Associates has failed to allege improper motive or purpose. Reardon Associates' allegations, if established by proof, are sufficient to support this element. The motion to dismiss Count VII is DENIED.

In fraud cases, the threshold for dismissal is elevated by Rule 9(b)'s requirement that fraud must be pled with particularity. *Royal Business Group, Inc. v. Realist. Inc.*, 933 F.2d 1056, 1065 (1st Cir. 1991). This rule has been understood as requiring that fraud claims specify "the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226. 228 (1st Cir. 1980). In Count X, Reardon Associates alleges that Energomash, "on behalf of itself and Pratt & Whitney, has made false material representations" but it does not allege that Pratt & Whitney itself did so. In its opposition to Pratt & Whitney's motion, Reardon Associates points to several other paragraphs (¶¶ 19, 26-27, 29-32, 34, 40-49) in the complaint which are the basis of the fraud claim. (*See* Pl.'s Opp'n to Def. Pratt & Whitney's Mot. to Dismiss at 4-5.) These paragraphs allege that Reardon Associates contacted Pratt & Whitney on behalf of Energomash in the fall of 1992, that Pratt & Whitney and Reardon Associates negotiated for the right to sell and distribute Energomash technology, and that Pratt & Whitney entered into an agreement with Energomash. Nowhere in these allegations is there a suggestion that Pratt & Whitney made any false representations to Reardon Associates. Not only has Reardon Associates failed to allege fraud with particularity, it has failed to allege fraud at all.

Pratt & Whitney's motion to dismiss is GRANTED as to Count X.

3. *Energo's Motion to Dismiss*

Energo moves to dismiss for failure to state a claim under the sole count against it alleging breach of contract (Count I).

On June 23. 1993. Joseph L. Reardon. as president of Energo, signed a "representative agreement" with Energomash providing for payment to Energo of commissions ranging from five to ten percent of the value of certain of Energomash's future contracts. At the same time, Mr. Reardon as president of Reardon Associates signed a "representative agreement" with Energo providing for payment to Reardon Associates of commissions ranging from thirty to seventy percent of the commissions received by Energo from Energomash. The existence of these contracts is not disputed. Count I of the amended complaint alleges, among other things, that Energo breached its contract with Reardon Associates "by failing to make accumulated commission payments." This allegation is in itself sufficient to state a claim upon which relief may be granted. While Energo argues that the fact that Mr. Reardon was president of both companies at the time the contract at issue was made gives rise to a potential defense that the contract is void for self-dealing, the enforceability of the contract and the circumstances surrounding its formation are not suitable for adjudication on a motion to dismiss. Energo's motion to dismiss is DENIED.

4. *Reardon Associates' Motion to Serve Process Outside the United States*

Reardon Associates requests permission to serve process upon Energomash and the individual defendants Boris I. Katorgin, Gennady G. Derkach, and Victor A. Sigaev (collectively, "the Russian defendants") by facsimile

transmission, and in fact to regard the facsimile transmission completed on March 27, 1997, as effective service.

These defendants assert the Foreign Sovereign Immunities Act of 1975 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, applies to service of process upon them. If so, service of process is governed by § 1608 of the Act. *See* Fed. R. Civ. P. 4 (j)(1) ("Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608"). The relevant portion of the statute requires that if no special arrangement between the parties exists, service must be made either by service on a previously designated agent in the United States or "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. § 1608(b)(2).

Even if the defendants are not covered under the FSIA, service upon both individuals and corporations in a foreign country requires that service be effected "by any internationally agreed means reasonably calculated to give notice." Fed. R. Civ. P. 4 (f)(1).

So, whether the Russian defendants are considered agents of the state or not, service must be effected according to a mutually-agreed upon means of service of process between Russia and the United States. *The "Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935,"* 49 Stat. 3849; Executive Agreement Series 83, requires service by letters rogatory. *See Semtek Intl. Inc. v. Merkuriy Ltd.*, No. 95-11820-RCL, slip op. at 3-4 (D. Mass. Aug. 13, 1996).

Accordingly, the motion to serve process by facsimile, *nunc pro tunc* and/or prospectively, is DENIED.

5. *Russian Defendants' Motion to Dismiss Amended Complaint*

The Russian defendants (Energomash and the individual defendants) have also moved to dismiss all substantive counts against them for insufficiency of process, lack of personal jurisdiction. and improper venue.

As discussed above, service of process upon them was improper. However, as there is reasonable prospect that service may yet be obtained, this Court will grant leave for the plaintiff to effect proper service. *See Semtek*, No. 95-11820-RCL at 7. If proper service is effected, and if the parties so move, the Court will consider other grounds for dismissal of these counts at that time.

CONCLUSION

For the forgoing reasons, the motion by defendant Amross to dismiss Count VII as against Amross for lack of personal jurisdiction is granted. Pratt & Whitney's motion to dismiss is denied as to Count VII and granted as to Count X. Energo's motion to dismiss Count I is denied. Reardon Associate's motion to serve process outside of the United States by facsimile is denied. The Court hereby grants plaintiff J.L. Reardon Associates, Ltd. ninety days to effectuate service under the applicable international agreements.

It is SO ORDERED.

March 26, 1998

/s/ _____
DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 16 2001
CLERK

No. 01-103

IN THE

Supreme Court of the United States

ALEXANDRE KONANYKHINE,
Petitioner,

v.

IZVESTIA NEWSPAPER, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

JOHN C. KEENEY, JR.*
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32 pp

QUESTION PRESENTED

Whether the court below correctly held that service of process under a since-repealed Virginia statute on a defendant in Russia by first-class mail conflicted with a current treaty between the United States and Russia, a treaty consistently interpreted by the United States Department of State and the Russian government as requiring such service be made by letters rogatory.

RULE 29.6 STATEMENT

Respondent Izvestia Newspaper is not a legal entity, but rather is the newspaper publication *Izvestia*. Respondent Editorial Staff of Izvestia Newspaper is a misnomer for Open Joint Stock Company Editorial Staff Izvestia, a Ru[illegible] corporation. Open Joint Stock Company Editorial Staff Izvestia has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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IN THE

Supreme Court of the United States

No. 01-103

ALEXANDRE KONANYKHINE,

Petitioner,

v.

IZVESTIA NEWSPAPER, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

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BRIEF IN OPPOSITION

In a state court action in Virginia, petitioner – a Russian national – obtained a $33.5 million default judgment against respondents – a Russian newspaper and its publisher (hereafter, collectively "Izvestia") – on a defamation claim arising from the publication of an article in Russia. Pet. 4-5; Pet. App. 8a-9a. When he initiated this action, petitioner chose to serve respondents through substituted service on the Secretary of the Commonwealth under Virginia's long-arm statute. Pet. 4. The Secretary then allegedly forwarded the process to respondents overseas via first-class mail, *see* Va. Code Ann. 8.01-329 (1997), a method lacking any proof of actual receipt. Respondents' three weeks to answer this action began not upon their alleged receipt of the process, but when the Secretary filed a certificate of compliance with the

trial court shortly after the alleged mailing. Va. Code Ann. 8.01-329 (1997).

This procedure closely parallels the discredited civil-law practice of *notification au parquet,* whereby actions against foreign defendants were commenced merely by depositing a writ with a local official who then attempted to notify them. *See Volkswagenwerk Aktiengesellschaft* v. *Schlunk,* 486 U.S. 694, 709 n.1 (1988) (Brennan, J., concurring) (citations omitted). Those actions proceeded whether or not the official succeeded. *Id.* The head of the United States delegation that helped to draft the Hague Service Convention referred to *notification au parquet* as an "'[i]njustice, extravagance, [and] absurdity. . . .'" *Id.* at 710 (quoting Amram, *The Revolutionary Change in Service of Process Abroad in French Civil Procedure*, 2 Int'l Law 650, 650-651 (1968)).

More germane to this petition, however, is that petitioner's choice for service of process violated an active agreement between Russia and the United States governing service of process on Russian defendants. That agreement required that such service be via the verifiable medium of letters rogatory. *See* Exchange of Notes at Moscow Nov. 22, 1935; related Note of Jan. 19, 1937, 11 Bevans 1262 ("Exchange of Notes"); Pet. App. 15a-23a. Petitioner now asks this Court to intrude into the foreign relations power to declare that the Exchange of Notes is not the exclusive means of serving defendants in Russia. Implicitly, the petition also asks the Court to determine that service of process on overseas foreign defendants by untraceable first-class mail satisfies the Due Process Clause of the Fourteenth Amendment.

Appearing specially, Izvestia asks that the petition be denied. A ruling by the Court on these issues is neither necessary nor appropriate on this petition. First, only four months after petitioner filed this suit and attempted service, the Virginia General Assembly repealed the long-arm provision that authorized service by first-class mail. This

intervening legislation makes this a poor case for certiorari. Second, deferring to the well-settled construction given the Exchange of Notes by its signatories, the Virginia courts correctly ruled that service of process by first-class mail on Russian defendants was precluded. Third, the many state law irregularities committed by petitioner below – including, significantly, not providing the Secretary of the Commonwealth with the Russian translation of respondents' address – all demonstrate that this petition does not meet the rigorous standards for certiorari.

This petition seeks an extraordinary result. Simply put, the article at issue was published and read almost entirely within Russia. Petitioner nevertheless sought recovery in the United States. By doing so, petitioner contends that newspapers are subject to global liability from the sale of a few copies of their papers overseas or from publication of their articles on the internet, liability that can be initiated by the thin thread of service by first-class mail.

Such a result should give the Court pause. The risk that the Washington Post Company, because of the presence of a handful of copies of the *Washington Post*, could be subject to liability in Moscow or Benghazi could have a chilling effect on the dissemination of information and news here. Because of these significant First Amendment implications, a newspaper should, at a minimum, be proven to have received actual notice of a foreign action before such liability could be imposed.

STATEMENT OF THE CASE

Respondents publish *Izvestia*, a daily newspaper printed in Russia, Trial Tr. 34-35, written in Russian, *id.* 32, and distributed to approximately 2 million Russians daily, *id.* 40. Respondents have no contacts with Virginia. They have not entered any contracts, possessed any property, or transacted

any business in that state.[1] They do not sell or otherwise make *Izvestia* available in Virginia. *See id.* Contrary to petitioner's unsupported assertions, Pet. 4, other than some mention of an ability to obtain or read copies of *Izvestia* in Virginia, the record lacks any evidence of contacts between respondents and Virginia. Like major American papers, a few copies of *Izvestia* may find their way to other countries. To the extent those copies find their way to the United States and Virginia, however, they do so through the actions of others, not respondents. In sum, respondents have never purposefully directed their business activities to nor derived substantial revenue from Virginia.

Petitioner is a Russian national previously granted asylum in the United States. He claims that by 1992, when he was only 25, he owned four banks, the largest brokerage, and extensive real estate holdings in Russia. Trial Tr. 50-51. He claims to have been worth $300 million. *Id.* That same year, he claims that he was kidnapped by former KGB officials, who allegedly stole most of his assets. *Id.* 56. Ultimately settling in the United States, he was arrested in June 1996[2] and detained until July 1997 while fighting extradition to Russia on charges that he had embezzled over $8 million from a Russian bank. *Id.* 63-65.

Prior to September 16, 1997, petitioner granted numerous interviews for articles in such widely read newspapers as the *Village Voice*, *Washington Post*, and *Wall Street Journal*, and for a *60 Minutes* television segment. These news stories detailed the various crimes that petitioner was suspected of by the Russian government, the FBI, and the Federal

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[1] Amended Mot. of Def. Open-Joint Stock Co. Editorial Staff Izvestia to Vacate Default J., Ex. 1, Aff. N. Tanchevskaya ¶¶ 5-7.

[2] C. Burrell, *INS Arrests Couple Accused of Embezzling From Russian Investors*, Associated Press, June 28, 1996; P. Constable, *Russian Pair in Custody, Accused of Embezzlement*, Washington Post, June 29, 1996, at A2.

Reserve, crimes including embezzlement, money laundering, and racketeering.[3]

Despite these prior articles, to which he did not object, petitioner sued respondents for allegedly publishing similar allegations in the September 16, 1997 issue of *Izvestia*.[4] Though a resident of the District of Columbia, Mot. for J. ¶ 4, petitioner chose an unrelated forum – Virginia – to sue a Russian newspaper over stories published almost exclusively in Russia.[5] Ignoring the Exchange of Notes, petitioner requested service under Virginia's long-arm statute, Pet. 4, resulting in the process being transmitted overseas via first-class mail. Notably, had he sued either in the District of Columbia or in a United States district court, he would not have been able to use first-class mail service. Both those court systems require, at a minimum, that service on overseas defendants use a mail method that provides a signed receipt to evidence that the addressee actually received the process. Fed. R. Civ. P. 4(f)(2)(C)(ii); D.C. Super. Ct. R. 4(f)(2)(C)(ii).

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[3] *E.g.*, P. Constable, *From Russia With Chutzpah,* Washington Post, Aug. 18, 1996, at F1; J. Gould, *Gangster Bankers: A Young Russian's Run-ins with Organized Crime and Offshore Money Laundering,* Village Voice, Sep. 16, 1997; D. Farah, *Russian Crime Finds Haven in Caribbean,* Washington Post, Oct. 7, 1996, at A15; G. Simpson & D. Cloud, *Fed Probed Russian Bank Menatep in 1995*, Wall Street Journal, Sep. 3, 1999, at A4 ("The U.S. Federal Reserve in 1995 conducted an inquiry into possible illegal banking activities by Menatep, the Russian bank . . .. According to court documents, the 1995 Fed probe of Menatep concerned the activities of former Menatep Vice President Alexandre Konanykhine. . . .")

[4] Initially, petitioner also sought recovery for a December 1996 article that allegedly claimed he was a swindler. Mot. for J. ¶¶ 42-55. Petitioner abandoned this claim at trial.

[5] Initially, the suit listed four other defendants, none of whom had any relation to Virginia either. Those other defendants were a web-site operator in New Mexico, a reporter residing in New Jersey, and two reporters residing in Russia.

When respondents failed to answer the process, petitioner moved for entry of default. He then set the issue of damages for trial, never notifying respondents of the trial date. He then tried his case to a jury *ex parte*, dismissing the only two defendants who had appeared in the action – the last on the eve of trial – thereby ensuring that he would proceed *ex parte*.

Petitioner's maneuvers paid off. Including jury selection and deliberations, the trial lasted two to three hours. Trial Tr. 4. The evidence consisted of two exhibits and two witnesses. The jury returned a verdict of $3.5 million in compensatory damages and $30 million in punitive damages, the maximum amounts that the trial court permitted petitioner to seek. Trial Tr. 107-108.

After learning of the judgment, respondents appeared specially to challenge jurisdiction and to set aside the default verdict. After full briefing and oral argument, the trial court vacated the default and the default judgment because of petitioner's failure to serve process under the Exchange of Notes. Pet. App. 2a-3a. The trial court reaffirmed this ruling on rehearing. Respondents subsequently moved to dismiss the case for petitioner's continuing refusal to serve them properly within one year of commencing the action, as required by Virginia law. *See* S. Ct. Va. R. 3:3. The trial court granted that motion on August 25, 2000. Pet. App. 6a. Petitioner subsequently petitioned the Supreme Court of Virginia to review the decision of the trial court. After full briefing on the petition and oral argument by petitioner, the Supreme Court of Virginia declined review. Pet. App. 1a.

REASONS FOR DENYING THE WRIT

I. INTERVENING STATE LEGISLATION MAKES THIS CASE ILL-SUITED FOR CERTIORARI

1. The Exchange of Notes aside, petitioner's attempted use of first-class mail to serve respondents had to satisfy due process for the judgment to be valid. To do so, such service

must have been "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Less than four months after petitioner attempted service, the Virginia General Assembly apparently decided that service by first-class mail was not so "reasonably calculated" and repealed the provision petitioner used. 1998 Va. Acts ch. 259 (adopted Apr. 7, 1998). In its place, Virginia now requires that substituted service on the Secretary of the Commonwealth be forwarded to defendants by certified mail, return receipt requested. Va. Code Ann. 8.01-329.

The General Assembly's action was prompted by the refusal of Maryland to award full faith and credit to a Virginia default judgment against Maryland residents who had allegedly been served by first-class mail. *See Miserandino* v. *Resort Properties, Inc.*, 691 A.2d 208, 220 (Md.), *cert. denied*, 522 U.S. 953 (1997). As the Court of Appeals explained in that case, service by first-class mail provided no indicia that service was actually received, *see id.* at 215, thereby rendering it constitutionally insufficient to confer personal jurisdiction on domestic non-residents of Virginia. The Virginia legislature promptly agreed. Nevertheless, petitioner now requests that this Court reinstate a vacated state court judgment based on the alleged constitutional sufficiency of first-class service on foreign defendants. Virginia's repeal of the very provision on which petitioner must rely to support his judgment establishes that this Court should not entertain the petition.

2. This Court need not be concerned about the purported conflict among the district courts concerning the scope of the Exchange of Notes. For while petitioner cites two cases that question the exclusivity of the agreement, both those cases are consistent with the principle enunciated in *Miserandino* and supported by the Virginia legislature's amendment of the

long-arm statute, namely that service on an overseas defendant has to be by a more effective method than first-class mail. In *Forum Financial Group, LLC* v. *President of Harvard College*, 199 F.R.D. 22 (D. Me. 2001), the court ordered that plaintiff personally serve the domestic attorney for the overseas defendant. And in *Filus* v. *LOT Polish Airlines*, 819 F. Supp. 232 (E.D.N.Y. 1993), the service was made under the Foreign Sovereign Immunities Act, which requires, at a minimum, that service be by a form of mail requiring a signed receipt. 28 U.S.C. 1608(a). Thus both cases acknowledge what petitioner chose to ignore: in personam jurisdiction over foreign defendants requires a verifiable means of service, whether or not the Exchange of Notes applies. Petitioner's use of first-class mail violated this principle, so the petition does not raise an issue substantial enough for this Court to grant the writ.

3. This petition squarely presents the very concern that underlies the opinion in *Miserandino* and the amendment of the Virginia long-arm statute, namely actually establishing that a non-resident defendant received notice of an action. Respondents do not concede that they ever received the process allegedly mailed by the Secretary of the Commonwealth or, in fact, answered it. In June 1998, respondents underwent a complete change in management.[6] At the time of that change and continuing until after the judgment, respondents' current management was unaware of this suit. *Id.* ¶¶ 5-6. Because of the change, respondents cannot ascertain if the alleged writing is authentic or whether it was sent in response to the process, to unofficial communications from petitioner's attorneys, or for some other reason. This state of affairs highlights the need for a traceable means of serving process on overseas defendants. In any event, Virginia law treats the writing as a nullity,

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[6] Pl. Konanykhine's Resp. to Amended Mot. of Def. Editorial Staff of Izvestia Newspaper Mot. to Vacate Default J., Ex. 8, Aff. N. Tanchevskaya ¶ 4.

because a corporation cannot appear *pro se* in a Virginia court. *Glumina Bank d.d.* v. *D.C. Diamond Corp.*, 527 S.E.2d 775, 776 (Va. 2000). Petitioner's avoidance of the procedures in the Exchange of Notes left the trial court with no means of determining whether a foreign newspaper had received actual service of a defamation suit that resulted in a multi-million dollar default judgment against it.

II. THE TRIAL COURT APPLIED THE SETTLED INTERPRETATION TO THE EXCHANGE OF NOTES AND REACHED THE CORRECT RESULT

1. The signatories' construction of the Exchange of Notes establishes that petitioner was required to serve respondents by letters rogatory. An exchange of notes is the constitutional equivalent of a treaty of the United States. *United States* v. *Belmont*, 301 U.S. 324, 331 (1937). This Court has stated that, to properly ascertain a treaty's meaning, it is appropriate to go beyond the text and consider such factors as its history, negotiations, and, of particular significance here, the construction given it by the parties. *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 431-432 (1943). Moreover "[t]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982).

Here, the United States and Russia have consistently interpreted the Exchange of Notes as being nearly exclusive, requiring that all service of process on Russian defendants by United States courts be via letters rogatory unless a Russian court – after a hearing – rules otherwise.

> Requests for service . . . in Russia may be accomplished only by means of letters rogatory. This was codified by an exchange of notes at Moscow on November 22, 1935 and a related note of January 19, 1937 (49 Stat. 3849; Executive Agreement Series 83).

U.S. Dep't of State Circular on Foreign Law, *Preparation of Letters Rogatory for the Use in Russia* (emphasis supplied); Resp'ts App. 1a.

> According to [a Supreme Soviet decree], which Russia has recognized since 1991, the one exception to service by letters rogatory is service by an agent or through international registered mail with prior permission from a Russia court.

Semtek Int'l, Inc. v. *Merkuriy Ltd.*, No. 95-11820-RCL (D. Mass. Aug. 13, 1996) (citing Presidium of Supreme Soviet of U.S.S.R., *Acknowledgement of the Decisions of Foreign Courts and Courts of Arbitration in the U.S.S.R.*, Decree No. 9131-XI, 26 Vedomosti SSSR item 427 (1988)). Pet. App. 37a.

The State Department's current website reiterates the continuing validity of this statement in *Semtek*:

> The service of United States judicial documents in Russia is usually effected by letters rogatory. . . .
>
> Legal documents may also be served by agent or through international registered mail. However, in accordance with the directive of the Supreme Soviet of June 21, 1988, compulsory service of legal documents is not possible by these means without prior permission from a Russian court. In this event, an open hearing is held (of which the defendant must be informed) to determine the suitability of the request. If the court grants its permission for service, a Russian Writ of Execution (Ispolnitelniy List) is issued, and the documents may be served through the requested means.

Judicial Assistance in the Russian Federation, at http://www.travel.state.gov/ russia legal.html (last visited Aug. 10, 2001). Resp'ts App. 4a.

Additionally, the Administrative Office of the United States Courts has recognized the mandatory nature of the Exchange of Notes since 1980:

> [W]e are requesting clerks of court to refrain from sending summonses and complaints by international mail to foreign defendants in those countries which have protested service by international mail, namely . . . the Union of Soviet Socialist Republics. *In those countries, letters rogatory are the appropriate mechanism for service.*

Memorandum of Gen. Counsel of Admin. Office of the United States Courts, *Service of Process in Foreign Countries* (Nov. 6, 1980) (emphasis in original). Resp'ts App. 9a.

In sum, here the United States and Russia completely agree: letters rogatory under the Exchange of Notes is virtually the sole method by which a United States plaintiff may serve a Russian defendant. The only exception does not include service by first-class mail, but like letters rogatory provides safeguards to ensure that the defendant receives actual notice of the suit. Though petitioner reads the language differently and argues that the Exchange of Notes does not delineate the exclusive means of service, under *Avagliano* the longstanding, contrary interpretations of the Department of State, the Administrative Office, and the Russian government are entitled to great weight and, in fact, are dispositive.

2. Having properly interpreted the Exchange of Notes, the trial court then also properly determined that the Exchange was still recognized by both signatories despite the fall of the Soviet Union. The United States still lists the Exchange of Notes in *United States Treaties and Other International Agreements*, which by law compiles all valid treaties and other international agreements. 1 U.S.C. § 112a. And Russia, having proclaimed that the treaties and agreements of

the Soviet Union would remain in force until further notice,[7] has never notified the United States that the Exchange of Notes is no longer recognized.

Thus, the Exchange of Notes remains a valid treaty binding on Virginia under the Supremacy Clause. U.S. Const. art. VI, cl. 2. Consequently, the trial court properly vacated the default resulting from petitioner's use of Virginia's long-arm statute rather than the Exchange of Notes to serve respondent. There is no need for this Court to grant the petition.

III. ADDITIONAL INDEPENDENT STATE LAW GROUNDS VOID THE VACATED DEFAULT JUDGMENT

This record is a particularly inappropriate platform for the Court. Simply put, this case is rife with petitioner's procedural defaults as a matter of Virginia law. For example, if Izvestia did file an answer, as petitioner contends, Pet. 4, then Virginia law required an additional notice to Izvestia of the trial date. S. Ct. Va. R. 3:17. Petitioner's failure to provide that date deprived respondents of their right to cross-examine petitioner's witnesses, rebut his evidence, ask for jury instructions, and argue damages to the jury. *Chappell* v. *Smith*, 156 S.E.2d 572, 574 (Va. 1967). Additionally, petitioner failed to assist the trial court by alerting it that over $29.6 million of the judgment exceeded Virginia's $350,000 limit on punitive damages. Va. Code Ann. § 8.01-38.1. Petitioner therefore permitted the court to enter a judgment that violated Virginia law.

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[7] Agreements Establishing the Commonwealth of Independent States, Dec. 21, 1991, 31 I.L.M. 138, 145-146 (1992) ("The High Contracting Parties [Belarus, Russian Federation, and Ukraine] undertake to discharge the international obligations incumbent on them under treaties and agreements entered into by the former Union of Soviet Socialist Republics.")

But the most significant error concerns the attempted service in this case. Petitioner provided the Secretary with only the English translation of respondents' address. This was crucial because not only do our two countries not share a language, we do not share an alphabet:

As requested:	Actual address:
18 Tverskaya Street, Building 1 Moscow K-6 GSP 103791 Russia[8]	ул. Тверская, дом 18, строение 1 103791 Москва К-6 ГСП Россия

Thus, petitioner essentially misaddressed the process here, trusting to fortune that the receiving Moscow post office might translate and properly deliver the parcel. As noted above, however, we cannot now determine whether respondents actually received this process.

Thus, were this Court to grant the writ and ultimately remand this case, the underlying result would likely be the same. Petitioner's judgment is so flawed that it will not stand up to further scrutiny by the Virginia courts. Accordingly, the petition does not present a compelling case for addressing the question presented.

---

[8] Aff. for Service of Process on Sec'y of the Commonwealth.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN C. KEENEY, JR. *
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APPENDIX A

United States Department of State

Washington, D.C. 20520

PREPARATION OF LETTERS ROGATORY FOR THE USE IN RUSSIA

Requests for service or for evidence in Russia may be accomplished only by means of letters rogatory. This was codified by an exchange of notes at Moscow on November 22, 1935 and a related note of January 19, 1937 (49 Stat. 3849; Executive Agreement Series 83).

1. A letter rogatory is a letter of request from a court in the United States to a court in a foreign country requesting international judicial assistance. For a sample letter rogatory see: 4 J. Moore, Moore's Federal Practice, 28.05; 22 CFR 92.54, 92.66 (Caveat: Do not draft the letter rogatory as a request from the President of the United States, but rather as a request from the court.) Also see 8 Wigmore, Evidence, rev. (McNaughton 1961) Sec. 2195a (ii).

2. Letters rogatory must be issued under the seal of the court and the signature of the judge. The letter rogatory should be addressed simply "To Appropriate Judicial Authority of the Russian Federation." (See The Mandu, 11 F. Supp. 845, EDNY 1935).

3. The letters rogatory and any accompanying documents must be translated into the Russian language regardless of the region in Russia in which they are to be

executed. The translator should execute an affidavit as to the validity of the translation before a notary.

4. The letters rogatory must be submitted, in duplicate, to the Office of Citizens Consular Services, Room 4817 N.S., Department of State, Washington, D.C. 20520 for onward transmission to the American Embassy in Moscow. The American Embassy will transmit them to the Russian Ministry of Foreign Affairs. The documents will then be sent by the Ministry of Foreign Affairs through the Ministry of Justice to the appropriate court. The documents transmitted to the Department of State should therefore include the following: the original letter rogatory under seal, or a certified copy thereof; a photocopy of the letter rogatory; an original translation of the letter rogatory and any accompanying documents with a notarized statement of authenticity of translation; and a photocopy of the translation.

5. The documents transmitted to the Department of State should be accompanied by a letter which sets forth the name of the case, docket number, and mailing address of the clerk of court to whom the executed request should be returned. In addition, the letter should include a statement of responsibility for additional costs incurred in excess of the required deposit which accompanies the letter. The deposit should be in the form of a certified check or money order made payable to the American Embassy Moscow in the amount of $100.00.. The consular fee for handling letters rogatory ($16.00) will be deducted from the deposit. Any monies not expended in payment for foreign government fees will, of course, be refunded. If there is more than one person to be served or witness to be deposed, separate letters rogatory must be prepared. In such cases a deposit in multiples of the consular fee should be provided. (22 CRF 22.1, item 67, revised 2/1/81).

6. Additional questions regarding letters rogatory should be addressed to the Office of Citizens Consular Services, Europe and Canada Division (202) 647-3445. Interpretation

of a particular question of foreign law in a particular case should be referred to foreign counsel.

7. The information in this circular on foreign law has been obtained from past experience and is not necessarily authoritative. For specific information on service in the Russia, it may be helpful to contact the Russian Embassy in Washington, D.C. at (202) 939-8916, or an attorney in Russia.

APPENDIX B

JUDICIAL ASSISTANCE IN THE RUSSIAN FEDERATION

DISCLAIMER: THE INFORMATION CONTAINED IN THIS CIRCULAR RELATING TO THE LEGAL REQUIREMENTS OF SPECIFIC FOREIGN COUNTRIES IS PROVIDED FOR GENERAL INFORMATION ONLY AND MAY NOT BE TOTALLY ACCURATE IN A PARTICULAR CASE. QUESTIONS INVOLVING INTERPRETATION OF SPECIFIC FOREIGN LAWS SHOULD BE ADDRESSED TO THE APPROPRIATE FOREIGN AUTHORITIES OR FOREIGN LEGAL COUNSEL.

SERVICE OF PROCESS

The service of United States judicial documents in Russia is usually effected by letters rogatory. The document being served should be accompanied by a Russian language translation of its contents. (Such documents may be served without an accompanying translation if the party being served agrees to accept them.)

Legal documents may also be served by agent or through international registered mail. However, in accordance with the directive of the Supreme Soviet of June 21, 1988, compulsory service of legal documents is not possible by these means without prior permission from a Russian court. In this event, an open court hearing is held (of which the defendant must be informed) to determine the suitability of the request. If the court grants its permission for service, a Russian Writ of Execution (Ispolnitelniy List) is issued, and the documents may be served through the requested means.

OBTAINING EVIDENCE

Voluntary Depositions

Russian law does not specifically regulate the procedure by which voluntary depositions are obtained. The law does not prohibit anyone from taking or giving voluntary statements, regardless of nationality of the witness, provided that the information contained in the statement is not a state secret and will not adversely effect the state's institutional or individual interests. Voluntary statements are recognized as "evidence" regardless of the presence or absence of an attorney during the testimony process. However, statements obtained by means other than those detailed in the Russian Criminal and Civil Procedure Codes are not considered to be a "deposition of witness" in the Russian legal system.

The taking of voluntary depositions for use in United States courts is not prohibited by Russian law. A private U.S. attorney is not required to seek the interposition of a local Russian attorney is such a case. Russia is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters; therefore, a U.S. lawyer should observe rules of procedure based on the U.S. Federal Rules of Civil Procedure. The procedures for taking a statement under Russian law can be found in the following documents: the Criminal Procedure Code of the Russian Federation (Articles 72-74, 106, 155-161, 228, 270, 277, 283 and 286) and the Civil Procedure Code of the Russian Federation (Articles 61, 62, 87, 89, 153, 168, 169 and 170-73).

Non-Voluntary Depositions

Non-voluntary depositions are obtained either through the transmission of letters rogatory or by the procedures outlined in the Criminal and Civil Procedure Codes of the Russian Federation (ref. articles listed above). Again, non-voluntary testimony which is obtained in ways other than those described in the Criminal and Civil Procedure Codes is not considered a "deposition of witness" under Russian law, regardless of the presence or absence of an attorney.

Compulsion of Evidence/Judicial Compulsion of Witnesses to Testify

According to Russian law, only the Office of the Procurator, Russian courts and other investigatory institutions have the authority to compel an individual or an organization to make a legal statement regarding a pending case within an established period of time. Articles 31, 32, 119, 127 and 132 of the Russian Criminal Code permit investigatory institutions to authorize other institutions to conduct investigations, including the deposition of witnesses. They can do so by means of a "porucheniye" (authorization or commission), which is the Russian term that most closely approximates the meaning of the term "letters rogatory." In accordance with Article 436 of the Russian Code of Civil Procedure and Article 32 of the Code of Criminal Procedure, the compulsion of evidence at the request of a foreign institution is regulated by international agreements between Russia and the country requesting such action. If no agreement exists, requests involving civil cases are carried out if they do not interfere with Russia's sovereignty or safety.

Russian courts and investigatory institutions have the authority to order a witness evading a summons to testify to appear at a court hearing or before an investigator. However, no method exists to compel a witness to testify before a consular officer.

Pre-Trial Discovery

In accordance with Article 141 of the Civil Procedure Code of the Russian Federation, a judge preparing a civil case to be heard in court has the right to perform pre-trial activities. These include "osmotr na meste" (viewing the crime scene), interrogating the plaintiff and defendant, and asking the defendant to make a statement in writing.

Commercial Court Reporter Services

Stenographers should be available through the Moscow Society of Lawyers (Moskovskaya Kollegia Advocatov).

BILATERAL, MULTILATERAL, AND INTERNATIONAL AGREEMENT CONVENTIONS

At present, no bilateral agreement on judicial assistance exists between the United States and Russia. While Russia is signatory to the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents, it is not a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters or to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

APPENDIX C

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

William E. Foley
Director

Carl H. Imlay
General Counsel

Joseph F. Spaniol, Jr.
Deputy Director

November 6, 1980

MEMORANDUM TO: All United States District Court Clerks

SUBJECT: Service of Process in Foreign Countries

The Department of State has advised us that a number of foreign states have recently submitted diplomatic notes of protest objecting to service of process of international mail upon defendants residing within their territory. This memorandum is being distributed in an attempt to clarify the procedures to be followed in serving American judicial documents abroad.

Service upon defendants in cases arising in federal district courts is governed generally by Rule 4(i) of the Federal Rules of Civil Procedure. Service by mail is dealt with in Rule 4(i)(1)(D). That Rule provides that the clerks of court shall be responsible for dispatching the summons and complaint into the international mails.

When summonses and complaints are mailed abroad in accordance with Rule 4(i)(1)(D), this method of service, according to some foreign states, violates either the judicial sovereignty of those foreign states or international law. These governments protest that such service usurps the

functions of duly designated officials of their country who are charged by the domestic laws of their country to perform service of process.

Similarly, service by international mail in those countries which are a party of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, (done at the Hague, November 15, 1965; entered into force for the United States, February 10, 1969; 20 USR 361; TIAS 6638, 658 UNTS 163), and which have made a reservation with respect to Article 10(a) of the Convention, whereby a state declares it objects to service by international mail, has also generated diplomatic notes of protest.

In order to avoid this problem in the future, we are requesting clerks of court to refrain from sending summonses and complaints by international mail to foreign defendants in those countries which have protested service by international mail, namely Czechoslovakia, Switzerland, and the Union of Soviet Socialist Republics. In those countries, letters rogatory are the appropriate mechanism for service.

There are currently 19 countries party to the Hague Service Convention, including the United States, namely, Barbados, Belgium, Botswana, Denmark, Egypt, Finland, France, the Federal Republic of Germany, Israel, Japan, Luxembourg, Malawi, The Netherlands, Norway, Protugal, Sweden, Turkey, and the United Kingdom. Of those, Egypt, the Federal Republic of Germany, Norway and Turkey have indicated in their instruments of ratification that they object to service by international mail. Service, therefore, should not be attempted by international mail in those four countries. With regard to other Convention countries, service through the Convention is the preferred method.

We are sending, for your further information, portions of a document prepared by the Department of Justice entitled "International Judicial Assistance." This paper contains a clear and thorough discussion of the proper procedure for serving American judicial documents abroad under the

Hague Service Convention and in countries with which the United States has no treaty arrangements.

Carl H. Imlay
General Counsel

Attachments

Supreme Court, U.S.
FILED
AUG 28 2001
CLERK

No. 01-103

IN THE

Supreme Court of the United States

ALEXANDRE KONANYKHINE,
Petitioner,
v.

IZVESTIA NEWSPAPER and EDITORIAL STAFF
OF IZVESTIA NEWSPAPER,
Respondents.

On Petition for a Writ of Certiorari to the Virginia Supreme Court

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. THE U.S. AND RUSSIAN GOVERNMENTS, AS HAVE CONFLICTING U.S. DISTRICT COURTS, ARRIVED AT COMPLETELY OPPOSITE INTERPRETATIONS OF THE LONG DORMANT 1935 AGREEMENT. THEREFORE, THE PETITION FOR CERTIORARI SHOULD BE GRANTED TO RESOLVE THIS CONFLICT.

Despite the fact that the trial court vacated the default judgment and dismissed the case against Izvestia on the sole ground that service of process was not perfected pursuant to a 1935 agreement between the U.S. and Soviet Union,[1] Izvestia does not address the conflicts between the various courts which have interpreted this agreement or between the U.S. and Russian Governments' conflicting interpretations.

A. U.S. District Courts' Completely Opposite Interpretations

The 1935 agreement lay dormant and without judicial interpretation for almost sixty years. Beginning in 1993, at least seven courts have faced issues regarding service of process on Russian defendants.[2] In *Filus* and *Forum*

---

[1] Agreement Relating to the Procedure to be Followed in the Execution of Letters Rogatory; Exchange of Notes at Moscow, Nov. 22, 1935, U.S.—U.S.S.R., 49 Stat. 3840, E.A.S. No. 83, II Bevans 1262, Pet. App. 15a-23a ["1935 agreement"].

[2] *See Flius v. LOT Polish Airlines*, 907 F.2d 1328 (2nd Cir. 1990), *on remand*, 819 F. Supp. 232 (S.D.N.Y. 1993); *Semtek International, Inc. v. Merkuriy, Ltd.*, C.A. No. 95-11920-RCL, 1996 U.S. Dist. LEXIS 22248 (D. Mass. 1996) (Pet. App. 33a); *J.L. Reardon Associates, Ltd. V. NPO Energomash*, C.A. No. 97-10409-GAO, (D. Mass. 1998) (Pet. App. 40a); *Konanykhine v. Izvestia*, Law No. 97-1139, (Arlington County (Va.) Cir. Ct. 2000) (Pet. App. 2a-7a); *Compagnie NOGA D'Importation et D'Exportation S.A. v. Russian Federation*, No. 00-CIV-0632 (WHP) and No. 00-CIV-6995 (WHP), (combined cases), (S.D.N.Y. 2000); *Base Metal Trading, S.A. v. Russian Aluminum*, No. 00-CIV-9627 (JGK),

Financial, the courts found that the 1935 agreement does not require service of process to be perfected via letters rogatory. In *Semtek*, *Reardon* and *Konanykhine*, the courts found exactly the opposite: that the 1935 agreement requires service of process to be perfected via letters rogatory. The language used by these courts shows just how far apart the two sets of opinions are: *Forum Financial* held that the 1935 agreement "merely sets forth procedures for executing letters rogatory" and "does not prohibit other means of service," while *Reardon* held that the 1935 agreement "requires service by letters rogatory." Pet. App. 27a and 40a.

B. The United States and Russian Governments' Completely Opposite Interpretations

Izvestia misstates the U.S. Government's position with regard to the interpretation of the 1935 agreement. In its Opposition, Izvestia stated "the United States and Russia have consistently interpreted the [1935 agreement] as being nearly exclusive, requiring that all service of process on Russian defendants by United States courts be via letters rogatory unless a Russian court—after a hearing—rules otherwise." Resp. Opp. 9. Izvestia also stated that "the United States and Russia completely agree: letters rogatory under the [1935 agreement] is virtually the sole method by which a United States plaintiff may serve a Russian defendant." Resp. Opp. 11. Moreover, Izvestia neglects to mention that on August 21, 2000, the U.S. Department of State sent a diplomatic note to the Russian Embassy in Washington, D.C. which clearly stated that the 1935 agreement does not require service of process to be perfected via letters rogatory. Reply App. 1a.

(S.D.N.Y. 2000); *Forum Financial Group, L.L.C. v. President and Fellows of Harvard College*, 199 F.R.D. 22 (D. Me. 2001).

1. *The Russian Government's Interpretation*

In mid-2000, the controversy surrounding the interpretation of the 1935 agreement reached the highest levels of both the U.S. and Russian Governments. In *Compagnie NOGA*, a civil case pending in the Southern District of New York, the Russian Government was a defendant that moved to dismiss the complaint because service of process was not perfected via letters rogatory. In a diplomatic note to the U.S. Department of State dated May 10, 2000, the Russian Embassy in Washington, D.C. claimed:

> [i]n accordance with the exchange of notes between the Parties of November 22, 1935, on the order of execution of letters of rogatory, these letters forwarded by the courts of the United States for execution must be sent through diplomatic channels, i.e. via the Embassy of the United States of America in Moscow and the Ministry of Foreign Affairs. Therefore, there is direct evidence of noncompliance by American courts with the existing procedures of notification of the defendant on the cases brought in by the 'NOGA' company. In this connection the Russian Side reserves for itself the right not to recognize any legal consequences resulting from the transmittal of judicial documents which has been performed in violation of the established procedure.

Reply App. 4a.

2. *The United States Government's Interpretation*

In response to the Russian Embassy's May 10, 2000 diplomatic note, the State Department transmitted a diplomatic note dated August 21, 2000 which stated:

> [i]n its note, the [Russian] Embassy advises that the Russian Federation objects to the manner of service in the [*Compagnie NOGA*] case, and asserts that service of process on the Russian Federation is governed by an

> Exchange of Notes [1935 agreement] between the United States and the Union of Soviet Socialist Republics of November 22, 1935.
>
> The Department of State wishes to inform the Embassy that it does not consider the Exchange of Notes to cover service of process in all instances on the Russian Federation. The Exchange of Notes addresses the manner in which the two governments will execute letters rogatory under their respective legal systems, when such requests are issued out of the courts of the other country. *The Exchange of Notes does not, however, purport to establish letters rogatory as the exclusive means of service of judicial process in the other state.* [emphasis added].

Reply App. 1a. In addition, the diplomatic note stated that "*where service of process is undertaken by means other than letters rogatory, the procedures in the Exchange of Notes have no application.*" [emphasis added]. *Id.* The United States also found that the 1935 agreement merely: addresses generally the procedures to be used in the execution of letters rogatory, whether these requests relate to taking evidence (the focus in the Exchange of Notes), to service of legal process, or to other forms of judicial assistance. *Id.* In holding that the 1935 agreement has no applicability when service is perfected by means other than by letters rogatory, the August 21, 2000 note quoted the *Filus* decision which stated "[p]lainly this exchange [1935 agreement] does not constitute an applicable international convention for service of judicial documents. It covers procedures for each country to honor letters rogatory issued by courts of the other country." *Id.*

C. Pending Cases involving Russian Defendants where Service of Process was not Perfected via Letters Rogatory

Presently, there are at least two cases pending where Russian defendants are involved in litigation in American courts: *Compagnie NOGA* and *Russian Aluminum*. Both of these cases involve multi-million dollar claims against Russian Defendants. In neither of these cases were the defendants served via letters rogatory. Therefore, the issue of service on a Russian defendant may arise again. In *Compagnie NOGA*, the defendant, the Russian Government, withdrew its motion to dismiss based on defective service prior to the Court's ruling on the issue. Reply App. 5a. In *Russian Aluminum*, some, but not all, of the defendants (one of whom is represented by Izvestia's counsel, Hogan & Hartson L.L.P.) entered into a stipulation waiving any objection to service. Reply App. 6a.

D. Courts have the Responsibility of Interpreting Treaties

Review of the 1935 agreement will not "intrude into the foreign relations power" as claimed by Izvestia, since the U.S. Government has stated its interpretation. In addition, interpretation of a treaty is a judicial function, which the courts cannot avoid merely because the result may have significant political overtones. *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 230 (1986).

E. Importance of Clear and Final Interpretation

In addition to *Compagnie NOGA* and *Russian Aluminum*, it is likely that there are, or will be, other cases in American courts involving Russian defendants considering the $10 Billion in annual bilateral trade between the U.S. and Russia. U.S. Dept. Of Commerce, Business Information Service for the Newly Independent States, *U.S.—Russia Trade Highlights (2000)*, *available at* http://www.bisnis.doc.gov/bisnis/

country/USRStrade_2000.htm. The *Semtek*, *Reardon* and *Konanykhine* cases which required that service of process be perfected via letters rogatory were based on incorrect assumptions of the U.S. Government's interpretation of the 1935 agreement since the U.S. position was not clearly defined at the time of these decisions. Konanykhine obtained the August 21, 2000 diplomatic note pursuant to the State Department's *Touhy Regulations*, 22 CFR Part 172. Other litigants and courts may not have access to this unpublished diplomatic note, and therefore, may continue to act on an incorrect assumption of U.S. policy. Therefore, Konanykhine's Petition should be granted to resolve the ambiguity over the interpretation of the 1935 Agreement and to reconcile the conflicts between the various U.S. District Court cases interpreting the agreement and the opposite positions of the U.S. and Russian Governments.

II. IZVESTIA RECEIVED ACTUAL NOTICE OF THE CASE, THEREFORE, IT IS IMMATERIAL WHETHER THE SERVICE WAS SENT VIA FIRST CLASS OR REGISTERED MAIL OR ADDRESSED IN ENGLISH OR RUSSIAN.

Notwithstanding the fact that it filed a response to Konanykhine's claims in the trial court, Pet. App. 24a-26a, Izvestia claims that service of process was improper because it was perfected via first class mail by the Virginia Secretary of the Commonwealth pursuant to the Virginia long-arm statute. Resp. Opp. 6-7. Izvestia neglects to mention that Konanykhine also served Izvestia pursuant to Russian law by registered mail dispatched in Russia by a Russian law firm. Reply App. 8a. In fact, the pleadings served by the Secretary of the Commonwealth and by Konanykhine's lawyers in Russia also contained Russian translations of the English language documents.

Izvestia does not even concede "that they ever received the process allegedly mailed by the Secretary of the Commonwealth or, in fact, answered it." Resp. Opp. 8. Also, Izvestia claims that since the Secretary of the Commonwealth transmitted the court documents to Izvestia using English characters, service is improper. This claim is at odds with Izvestia's admission in its motion to vacate default judgment that "[i]n mid-1998, Izvestia sent to the 'District court Arlington' a response to the Motion for Judgment, questioning the Court's jurisdiction and asserting complete defenses to the allegations set forth therein." Izvestia's Amended Motion to Vacate Default Judgment, p. 3, ¶10. *See* Pet. App. 24a-26a. The fact that Izvestia filed the response is conclusive proof that it received the documents sent by the Secretary of the Commonwealth. In fact, under Virginia law, a general appearance, such as the appearance made by Izvestia, "is a waiver of process, equivalent to personal service of process, and confers jurisdiction of the person on the court." *Nixon v. Rowland*, 192 Va. 47, 50 (1951). In any event, due process only requires that notice be given which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 314-15 (1950). Moreover, contrary to Izvestia's claims, Konanykhine sent Izvestia notice of the Term Day where the court scheduled the trial. Reply App. 10a. Because Izvestia received actual notice of Konanykhine's action and of the Term Day where the Court set the trial date, the mailing pursuant to the Virginia long-arm statute and the registered mailing by Konanykhine's Russian lawyers pursuant to Russian law afforded Izvestia due process, and is therefore, valid.

III. DESPITE EXTENSIVE BRIEFING AND ORAL ARGUMENT, THE ONLY REASON THE TRIAL COURT VACATED THE DEFAULT JUDGMENT AND DISMISSED THE CASE WAS BECAUSE SERVICE WAS NOT PERFECTED VIA LETTERS ROGATORY.

Despite extensive briefing and oral argument the only reason the trial court vacated the default judgement and dismissed the case was because service was not perfected via letters rogatory. Pet. App. 2a-7a.

A. Izvestia had Sufficient Minimum Contacts with Virginia to Warrant the Trial Court's Exercise of Personal Jurisdiction

In addition to arguing defective service in its motions to vacate default judgment and dismiss case, Izvestia argued that it did not have sufficient contacts with Virginia to warrant the trial court's exercise of personal jurisdiction. During the trial, and at other stages during the litigation, Konanykhine provided proof that jurisdiction was appropriate in Virginia because:

1. Izvestia interviewed Konanykhine in Virginia in connection with the defamatory article at issue. V. Nadeine, *Gambler*, Izvestia, Sept. 16, 1997.

2. Izvestia delivered its articles into Virginia through the Internet and through newsstands. Reply App. 11a.

3. Izvestia delivered its articles to libraries in Virginia. Reply App. 13a.

4. Konanykhine suffered damages in Virginia, in part, because his political asylum claim was pending in Virginia. Reply App. 11a.

5. Izvestia's U.S. Bureau was located in Virginia until 1997.

In addition, it is foreseeable that *Izvestia Newspaper*, a leading daily newspaper in Moscow, would be read in Virginia since many U.S. Government agencies which monitor the Russian press are located in Virginia. The trial court vacated the default judgment and dismissed the case on the sole ground that service of process was not perfected via letters rogatory. Although Izvestia objected to this limitation when it endorsed the order vacating the default judgment, it did not raise any jurisdictional objections as cross-error in it's Cross-Appeal which it filed in the Virginia Supreme Court. *See* Pet. App 2a. Perhaps the reason why Izvestia did not raise its jurisdictional claims as cross-error is because the evidence of Izvestia's contacts with Virginia is overwhelming.

B. Compelling Reasons why the Verdict in Excess of Virginia's Punitive Damage Limitation Should be Upheld

It is correct that $30 Million of the $33.5 Million awarded by the jury represented punitive damages. Pet. App. 8a. Also, it is correct that VA. CODE ANN. §8.01-38.1 limits a punitive damage award to just $350,000. The Virginia Supreme Court has yet to directly address the constitutionality of this limitation. Because such limitations have been struck down by other state courts as violative of the right to a jury trial, Konanykhine extensively briefed and argued that the limitation is unconstitutional. The trial court ignored the limitation and entered judgment for the full amount of the jury verdict. Pet. App. 8a. In vacating the default judgment, the trial court did not rule on Izvestia's punitive damage limitation claim, but instead limited its grounds for doing so to the fact that service was not perfected via letters rogatory. Even if the court had stricken punitive damages altogether, the award representing compensatory damages would still be $3.5 Million.

IV. KONANYKHINE OBTAINED A LARGE VERDICT AGAINST ANOTHER RUSSIAN NEWSPAPER ON VIRTUALLY THE SAME SET OF FACTS AS *IZVESTIA* AND WITH THE SAME CONTACTS WITH VIRGINIA AS *IZVESTIA*.

In January 2000, a jury awarded Konanykhine $3 Million Dollars as compensatory damages resulting from *Kommersant Daily Newspaper*'s publication of defamatory articles. *Konanykhine v. Kommersant Publishing House*, Law No. 97-1206, (Arlington County (Va.) Cir. Ct. 2000). The issues presented in *Kommersant* were similar to *Izvestia*. Kommersant's counsel filed a lengthy motion to dismiss which was similar to Izvestia's jurisdictional argument. After extensive briefing and oral argument, the court denied Kommersant's motion to dismiss. Reply App. 15a. In fact, at trial, Kommersant was represented by Izvestia's former counsel, Raymond W. Konan Esq. Despite Mr. Konan's vigorous advocacy, the jury returned a verdict for $3 Million representing compensatory damages—an amount close to the $3.5 Million awarded as compensatory damages in *Izvestia*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MELISSA WARNER SCOGGINS
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JOHN PAUL SZYMKOWICZ *
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1899 L Street, N.W; Suite 250
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* Counsel of Record

August 24, 2001

APPENDIX A

The Department of State refers to the Embassy of the Russian Federation's note No. 30 dated May 10, 2000, regarding service of legal process on the Russian Federation in *Compagnie NOGA D'Importation et D'Exportation S.A. v. The Russian Federation* (the "NOGA" case), a case pending in the United States District Court for the Western District of Kentucky. In its note, the Embassy advises that the Russian Federation objects to the manner of service in the NOGA case, and asserts that service of process on the Russian Federation is governed by an Exchange of Notes between the United States and the Union of Soviet Socialist Republics of November 22, 1935.

The Department of State wishes to inform the Embassy that it does not consider the 1935 Exchange of Notes to cover service of process in all instances on the Russian Federation. The Exchange of Notes addresses the manner in which the two governments will execute letters rogatory under their respective legal systems, when such requests are issued out of the courts of the other country. The Exchange of Notes does not, however, purport to establish letters rogatory as the exclusive means of service of judicial process in the other state. Where service of process is requested via letters rogatory, the Department of State agrees the procedures described in the Exchange of Notes would apply.

Under U.S. law, the exclusive means of service of process on a foreign state in civil proceedings is provided under the Foreign Sovereign Immunities Act (the "FSIA"), section 1608(a) (28 U.S.C. § 1608(a)). Section 1608(a) (2) includes the possibility of service "in accordance with an applicable international convention on service of judicial documents." The 1935 Exchange of Notes does not constitute an international convention on the service of judicial documents. Rather, the Exchange of Notes addresses generally the procedures to be used in the execution of letters rogatory,

whether these requests relate to taking evidence (the focus in the Exchange of Notes), to service of legal process, or to other forms of judicial assistance.

Where service of process is undertaken by means other than letters rogatory, the procedures in the Exchange of Notes have no application. The Exchange of Notes has been characterized as follows by an [sic] U.S. Federal Court: "Plainly this exchange [the 1935 Exchange of Notes] does not constitute an 'applicable international convention' for service of judicial documents. It covers procedures for each country to honor letters rogatory issued by courts of the other country." See *Filus v. LOT Polish Airlines*, 819 F.Supp. 232, 237 (E.D.N.Y. 1993). Moreover, at the time the FSIA was adopted, the U.S. Congress expressly stated in the legislative history regarding section 1608 (a) (2) that the only convention on service of judicial documents to which the United States was a party was the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents.

The FSIA permits service by several methods, including service by mail requiring return of a signed receipt, or, where service by mail cannot be made, by service through the diplomatic channel. If the Russian Federation objects to mail service and wishes to be served via the diplomatic channel, it may decline to sign the return postal receipt acknowledging mail service. If in a particular case mail service has been accepted, but the Russian Federation considers that this was done by an individual without the adequate authority (for example, by an entrance security guard), it may raise this issue with the court. The Department notes that the court, if it were persuaded to invalidate service on this ground, could decide to afford the plaintiff additional time in order to serve under section 1608 (a) (4) of the FSIA.

The Department appreciates the inconvenience and expense that may arise for the Russian Federation if mail service is accepted inadvertently. The Department is consulting with

the Department of Justice and with the Administrative Office of the United States Courts to consider whether guidance might be issued to the Clerks of the Federal District Courts on this topic. If issued, such guidance would seek to minimize occasions when mail service is attempted on the Russian Federation under the FSIA, though it could not ensure the elimination of all cases of attempted service by mail. If guidance is issued, the Embassy will be provided with a copy.

The Department of State trusts that the Embassy of the Russian Federation will find the foregoing information useful.

Department of State,

Washington,

August 21 2000

APPENDIX B

No. 30

The Embassy of the Russian Federation in the United Stales of America presents its compliments to the Department of State of the United States of America and in connection with the civil case of the Swiss company "NOGA" ("NOGA D'Importation et D'Exportation S.A.") versus the Russian Federation, dispatched to the Ministry of Foreign Affairs of the Russian Federation by airmail, has the honor to draw attention of the American Side to the following:

> In accordance with the exchange of notes between the Parties of November 22, 1935, on the order of execution of letters of rogatory, these letters forwarded by the courts of the United States for execution must be sent through diplomatic channels, i.e. via the Embassy of the United States of America in Moscow and the Ministry of Foreign Affairs. Therefore, there is direct evidence of noncompliance by American courts with the existing procedures of notification of the defendant on the cases brought in by the "NOGA" company.

In this connection the Russian Side reserves for itself the right not to recognize any legal consequences resulting from the transmittal of judicial documents which has been performed in violation of the established procedure.

The Embassy renews to the Department of State. the assurance of its highest consideration.

Washington, D.C.

May 10, 2000

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00-CIV-0632 (WHP)

COMPAGNIE NOGA D'IMPORTATION ET D.EXPORTATION S.A.

Plaintiff,

v.

The Russian Federation

Defendant.

NOTICE OF WITHDRAWAL OF MOTION TO DISMISS

Defendant, the Russian Federation, by the undersigned counsel, hereby withdraws its June 23, 2000 motion to dismiss the complaint.

Dated: New York, New York
September 27, 2000

CLEARY, GOTTLEIB, STEEN & HAMILTON

By: /s/
Howard S. Zelbo (HZ3227) A Member of the Firm
One Liberty Plaza
New York, New York 10006
(212) 225-2000
Attorneys for Defendant

SO ORDERED: 10/2/00
/s/
WILLIAM H. PAULEY, III, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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00 CIV. 9627 (JGK)

BASE METAL TRADING, S.A. BASE METAL TRADING LTD.; AND ALUCOAL LTD.,

Plaintiffs,

v.

RUSSIAN ALUMINUM; SIBIRSKY ALUMINUM PRODUCTS USA CORP. a/k/a SIBIRSKY ALUMINUM (U.S.); SIBIRSKY ALUMINUM (Russia); BAUXAL MANAGEMENT, S.A.; METCARE MANAGEMENT, S.A., UNIMETAL LIMITED, S.A.; OLEG DERIPASKA; MIKHAIL CHERNOI; CHERNOI COMPANIES 1 TO 10; AND NOVOKUZNETSK ALUMINUM ZOVOD,

Defendants.

IT IS HEREBY STIPULATED AND AGREED, by and between plaintiffs and the defendants indicated below (the "Defendants") that the Defendants' time to answer or otherwise move with respect to the Complaint herein is extended to and including May 24, 2001.

IT IS FURTHER STIPULATED AND AGREED that the Defendants acknowledge service outside of the United States (except for Sibirsky Aluminum Products USA Corp. which was served in the United States) and waive any objection to service.

STROOCK & STROOCK & LAVAN LLP

By: /s/
Robert Abrams (BA-3744)

Attorneys for Plaintiffs
180 Maiden Lane

WINSTON & STRAWN

By: /s/
Michael D. Burrows (MB-2863)

Attorneys for Sibirsky Aluminum Products USA Corp., Sibirsky

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(212) 806-5400

Aluminum (Russia), Bauxal Management, S.A., Metcare Management, S.A.,, Unimetal Limited, S.A. and Oleg Deripaska
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HOGAN & HARTSON

By: /s/
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MORVILLO, ABRAMOWITZ, GRAND IASON & SILBERBERG, P.C.

By: /s/
Paul R. Grand (PG-9144)

Attorneys for: Russian Aluminum Management, formerly known ask Russkiy Aluminiy and sued here as Russian Aluminum
565 Fifth Avenue
New York, New York 10017
(212) 856-9600

SO ORDERED:
/s/
John G. Koeltl
U.S.D.J.
2/2/01

APPENDIX E

ROSURTZENTR
LEGAL-AUDITING COMPANY

MARCH 11, 1998

No. 7-14/98

Attention: Mr. J.P. Szymkowicz
Law Firm Szymkowicz & Buffington

Dear J.P. Szymkowicz

In accordance with your request of December 29, 1997, I, Assistant of General Director of "ROSURTZENTR" A. Rusakov, sent claims of Mr. Konanykhine in reference to the newspaper "Izvestia", Joint-Stock Company Editorial Board of the Newspaper "Izvestia", Mr. Gennadiy Charodeev and Mr. Vladimir Mikheev (Claim No. 97-1139, Arlington Circuit Court).

Notification was mailed in the form required by the Legislation of the Russian Federation – by registered mail.

The list of documents sent by the above-mentioned defendants:

1. The Claim and its Russian translation

2. The Claim notification and its Russian translation

3. Request for jury

4. Plaintiff's Motion to the defendant Newspaper "Izvestia" for admissions of the facts and its Russian translation

5. Plaintiff's Motion to the Court regarding the Request for admissions;

6. Certificate of the admissions of the facts

Receipts proving the mailing are enclosed.

I am aware of my responsibility for perjury.

Sincerely,

Assistant of General Director
A. Rusakov

Approved,
Deputy General Director
O. Vorob'ev

Attached Registered Mail Receipts

Gennagiy Charodeev
13 Tverskaya Street, Building 1
Moskow, K-B GCP, 103791 Russia

Post Stamp 6192

Vladimir Mikheev
13 Tverskaya Street, Building 1
Moskow, K-B GCP, 103791 Russia

Post Stamp 6193

Editorial Board of The Newspaper "Izvestia"
13 Tverskaya Street, Building 1
Moskow, K-B GCP, 103791 Russia

Post Stamp 6194

The Newspaper "Izvestia"
Joint-Stock Company
13 Tverskaya Street, Building 1
Moskow, K-B GCP, 103791 Russia

Post Stamp 6195

APPENDIX F

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

Alexander Konanykhine,
Plaintiff,

vs.

Izvestia Newspaper, et al.
Defendants.

PLAINTIFF KONANYKHINE'S REQUEST TO PLACE CASE ON TERM DAY DOCKET

Plaintiff Alexandre Konanykhine, by and through his attorneys, J.P. Szymkowicz, and the Law Firm of SZYMKOWICZ & ASSOCIATES, P.C., respectfully respects this Honorable Court to place this case on the February 16, 1999 Term Day docket.

Respectfully submitted,

/s/
J.P. Szymkowicz
V.S.B. #39120

SZYMKOWICZ & ASSOCIATES, P.C.
1899 L Street, N.W., Suite 250
Washington, DC 20036
(202) 862-8500

Attorney for Plaintiff Konanykhine

APPENDIX G

(Excerpts from December 13, 2001 Izvestia Trial Transcript)

Direct Examination of Alec Sarkesian
Page 34, Line 17 through Page 35, Line 6

Q: How did you first learn who Alexandre Konanykhine was?

A: From Izvestia.

Q: What did you learn about Mr. Konanykhine from these articles?

A: He is a bad guy, he is a thief, he has stolen eight million dollars.

Q: Where did you read these negative things?

A: On Internet here in Virginia.

Q: Which Internet newspaper was that?

A: Izvestia.

Q: Is the newspaper that's available on the Internet the same newspaper, containing the same stories as available in the print version?

A: Yes. Yes.

Direct Examination of Alexandre Konanykhine
Page 71, Line 23 through Page 72, Line 12

Q: We're in court today because the defendant, Izvestia Newspaper printed statements about you in its on-line newspaper?

A: Yes.

Q: And in its newspaper in Russia; is that correct?

A: Yes. But, it's been distributed internationally, including United States, including Commonwealth of Virginia. It is distributed in—I mean, it's like many—on many newsstands you can buy not only English language articles like USA Today or Washington Post, but, also principle newspapers of other countries. And I think we're

here just because the damages were—happened here and I cannot work in, as I would work otherwise, because of these articles here in the United States.

APPENDIX H

VIRGINIA:

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: 97-1139

ALEXANDRE KOANYKHINE,
Plaintiff,

vs.

IZVESTIA NEWSPAPER, *et al.*,
Defendants.

AFFIDAVIT OF PLAINTIFF KONANYKHINE IN SUPPORT OF HIS RESPONSE TO DEFENDANT EDITORIAL STAFF OF IZVESTIA NEWSPAPER'S MOTION TO VACATE DEFAULT JUDGMENT

(attachments and footnotes omitted)

1. My name is Alexandre Konanykhine.

2. I am 33 years old, and am competent to testify as to the matters stated in this Affidavit.

3. This Affidavit is prepared in support of my Response to Defendant Editorial Staff of Izvestia Newspaper's Motion to Vacate Default Judgment.

4. On October 27, 1997, my wife, Elena Gratcheva and I bought a copy of Izvestia Newspaper at One Stop News, located at 1100 South Hayes Street, Arlington, Virginia.

5. I certify that I searched the Old Dominion University Library catalog and found that Izvestia Newspaper is available for review in this Library.

6. I certify that I searched the George Mason University Library catalog and found that Izvestia Newspaper is available for review in this Library.

7. I certify that I searched the University of Virginia Library catalog and found that Izvestia Newspaper is available for review in this Library.

I swear and affirm that the statements contained in this Affidavit are true under the penalties of perjury.

/s/
Alexandre Konanykhine

APPENDIX I

VIRGINIA

IN THE ARLINGTON COUNTY CIRCUIT COURT

Law Number: *97-1206*

ALEXANDER KONANYKHINE,
Plaintiff,

vs.

KOMMERSANT PUBLISHING HOUSE, *et al.*
Defendants.

ORDER

Upon consideration of Defendant Kommersant Publishing House, Defendant Kommersant Daily Newspaper and Defendant Infox, Inc.'s Motion to Dismiss for Lack of Personal Jurisdiction and Plaintiff Alexandre Konanykhine's Response thereto, it is this 17th day of April, 1998, HEREBY ORDERED THAT Defendants' Motion to Dismiss is DENIED.

April 17, 1998
Date

/s/
Benjamin Kendrick, JUDGE
Arlington County Circuit Court

Seen and agreed:

/s/
J.P. Szymkowicz, Esquire

SZYMKOWICZ & BUFFINGTON
2401 Pennsylvania Avenue, N.W.,
Suite 410
Washington, DC 20037
(202) 862-8500

Attorney for Plaintiff Konanykhine

Objected to:

/s/
Kathleen M. Graber, Esquire

MAYS & VALENTINE, L.L.P.

8201 Greensboro Drive, Suite 800
McLean, Virginia 22102-3805
(703) 734-4334

Attorney for Defendants